Jurisdictional Statement

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,
Appellants,

vs.

STANLEY E. PANKO and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

JURISDICTIONAL STATEMENT

ROBERT ALLEN SELIGSON
300 Montgomery Street
Suite 821
San Francisco, CA 94104
Telephone: (415) 788-4844
Counsel of Record for Appellants

ELLEN LAKE
414 Gough St., Suite 2
San Francisco, CA 94102
Of Counsel

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether the Home Owners' Loan Act of 1933 and Federal Home Loan Bank Board regulations, promulgated thereunder, that authorize federal savings and loan associations to include and enforce due-on-sale clauses in loan instruments, preempt California law, which prohibits the exercise of due-on-sale clauses except under very limited circumstances?

2. Whether a provision in a standardized deed of trust (drafted by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association and intended to be uniform nationwide), which states that the instrument shall be governed by "the law of the jurisdiction in which the property is located", was intended to waive federal law?

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PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,
Appellants,

VS.

STANLEY E. PANKO and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

JURISDICTIONAL STATEMENT

Appellants Pan American Savings and Loan Association (formerly Pan American Federal Savings and Loan Association) and Pan American Service Corporation appeal from the judgment of the California Court of Appeal, entered June 1, 1981 and modified June 29, 1981, and submit this jurisdictional statement to show that the Supreme

Court has jurisdiction of this appeal and that substantial questions are presented.[1]

OPINIONS BELOW

The opinion of the California Court of Appeal, reported at 119 Cal.App.3d 916, 174 Cal.Rptr. 240, as modified at 121 Cal.App.3d 532a, ... Cal.Rptr. ....., appears in Appendix A. The order of the Superior Court for the County of San Mateo, granting summary judgment and dismissing the action, is in Appendix B. The California Supreme Court's order denying Pan American's petition for hearing is reproduced in Appendix C.

JURISDICTION

The decision of the California Court of Appeal was entered on June 1, 1981 and modified on June 29, 1981. Appellants' petition for rehearing was denied on June 29, 1981. A timely petition for hearing was filed in the California Supreme Court on July 13, 1981 and denied on August 19, 1981. Appellants' notice of appeal (Appendix D) was filed in the California Court of Appeal on November 4, 1981, within ninety (90) days of the California Supreme Court's denial of hearing.[2]

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[1]The caption to the case contains the name of all parties to the proceeding in the California Court of Appeal whose judgment is sought to be reviewed.

Appellants: Pan American Savings and Loan Association (formerly Pan American Federal Savings and Loan Association) and Pan American Service Corporation, a wholly-owned subsidiary of Pan American Savings and Loan Association. Pan American Savings and Loan Association has no parent company, and neither corporation has any subsidiary or affiliate required to be disclosed under Rule 28.1 of this Court.

Appellees: Stanley E. Panko and George L. Sinclair.

[2]*American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the United States Constitution (Art. VI, cl. 2); section 5(a) of the Home Owners' Loan Act of 1933 (c. 64, § 5, 48 Stat. 132, 12 U.S.C. § 1464(a)); Federal Home Loan Bank Board Regulations 12 C.F.R. §§ 545.8-(3)(f) and (g), and 12 C.F.R. §§ 556.9(d) and (f); Federal Home Loan Bank Board Resolutions No. 76-100, 41 Fed. Reg. 6283, and No. 76-296, 41 Fed. Reg. 18286; and California Civil Code § 711. Each of these provisions is set forth in Appendix E.

STATEMENT OF THE CASE

The facts are not in dispute and are set forth in the California Court of Appeal opinion, Appendix A.

At the time of the events involved herein, Pan American Savings and Loan Association ("Pan American") was a federal savings and loan association chartered and regulated by the Federal Home Loan Bank Board ("Bank Board"), pursuant to Section 5a of the Home Owners'

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[3]Appellate jurisdiction of this Court in actions involving claims that state law may not be validly applied due to preemption by Federal law was noted in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973); *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18 (1949) and *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947). If this Court should find that this appeal has been improvidently taken under 28 U.S.C. § 1257(2), appellants respectfully request that this Jurisdictional Statement be considered as a Petition for Writ of Certiorari under 28 U.S.C. § 1257(3) in accordance with 28 U.S.C. § 2103. Since preemption of state law raises a constitutional question, 28 U.S.C. § 2403(b) may be applicable.

Loan Act ("HOLA"), 12 U.S.C. § 1464(a).[4] Under authority granted by the Bank Board, Pan American makes long-term loans for the purchase of real property, secured by deeds of trust on the property purchased by the borrower. Pan American is the beneficiary under these deeds of trust, and Pan American Service Corporation is the trustee.

Joseph and Sandra Karp owned a commercial building in San Mateo, California. In November 1977 they refinanced the property, obtaining from Pan American a loan for $161,000, bearing interest at ten (10%) percent per annum, secured by a deed of trust. The deed of trust used was a uniform instrument prepared by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association for use throughout the nation. It contained two standard provisions involved herein: a due-on-sale clause, which provides that the lender may call the loan due if the property is sold by the borrower without the lender's prior written consent, and a "choice of law" provision, which states, "This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located."

In June 1978 the Karps sold the property to appellees Stanley E. Panko and George L. Sinclair. Ignoring the requirements in the deed of trust, the Karps did not notify Pan American before the sale nor obtain its written consent. As a result, Pan American exercised the due-on-sale clause and demanded full payment of the loan balance, declining to accept the monthly payment tendered by

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[4]After the trial court had orally granted its motion for summary judgment, Pan American converted to a state-chartered savings and loan association. However, because all the critical events occurred while Pan American was federally chartered, the California Court of Appeal held that the conversion did not moot the case. (Appendix at A-12)

Panko and Sinclair in July 1978. When the Karps failed to pay off the loan, on August 18, 1978 Pan American recorded a notice of default.

On November 21, 1978 Panko and Sinclair filed in the San Mateo County Superior Court a complaint for declaratory and injunctive relief, seeking to enjoin Pan American from selling the property under the power of sale contained in the deed of trust or by foreclosure action. Panko and Sinclair contended that exercise of the due-on-sale clause by Pan American was an unlawful restraint on alienation, in violation of California Civil Code § 711, as interpreted by the California Supreme Court in *Wellenkamp v. Bank of America*, 21 Cal.3d 943, 148 Cal.Rptr. 379 (1978). *Wellenkamp* held that exercise of a due-on-sale clause upon the sale of mortgaged property constituted an unreasonable restraint on alienation unless the lender could demonstrate that enforcement was reasonably necessary to protect its security against the risk of default.

Appellants' answer to the complaint denied that their exercise of the due-on-sale clause constituted an unreasonable restraint on alienation and specifically alleged that "Pan American Federal Savings and Loan Association is not bound by any such provision of California law by reason of the federal preemption of this field and specifically the regulations of the Federal Home Loan Bank Board. . . ." Appellants thereafter moved for summary judgment on the ground that California Civil Code § 711 and the *Wellenkamp* decision were preempted by HOLA and the regulations of the Federal Home Loan Bank Board, which expressly authorize federal savings and loan associations to include and exercise due-on-sale clauses. The Superior Court granted appellants' motion and dismissed the action.

Panko and Sinclair appealed to the California Court of Appeal for the First Appellate District. That court concluded that state law was not preempted for several reasons. First, the court held that preemption could be based only on Congressional intention, not that of a duly authorized federal administrative agency acting within the scope of its authority. Second, the court reasoned that because the Bank Board regulation merely authorized, but did not mandate, the use of due-on-sale clauses, Pan American was not faced with a "physical impossibility" in complying with the two regulatory schemes. Third, the court held that the choice of law provision in the deed of trust expressed an "unmistakable intention" that state law should govern interpretation and enforcement of the instrument. The court held that this provision constituted a waiver of Pan American's preemption claim. The court reversed and remanded "for further proceedings consistent with the views expressed herein." (Appendix at A-11)

Appellants' petition for rehearing in the Court of Appeal was denied, although the court modified its opinion in several minor respects. Appellants' petition for a hearing in the California Supreme Court was denied without opinion.

THE QUESTIONS ARE SUBSTANTIAL.

I. WHETHER FEDERAL SAVINGS AND LOAN ASSOCIATIONS MAY ENFORCE DUE-ON-SALE CLAUSES AUTHORIZED BY FEDERAL REGULATIONS IN THE FACE OF CONTRARY STATE LAW IS A QUESTION OF NATIONWIDE IMPORTANCE WHICH IS CRUCIAL TO THE CONTINUED SOLVENCY OF THE FEDERAL SAVINGS AND LOAN INDUSTRY AND TO THE AVAILABILITY OF RESIDENTIAL FINANCING CAPITAL.

The issues raised by this case are of national significance on several levels. First, federal savings and loan associations across the country have been using due-on-sale clauses for many years. The question of their enforceability in the face of contrary state law affects millions of loan transactions in institutions throughout the nation. Second, due-on-sale clauses serve important economic purposes. A holding that states may prevent federal lending institutions from exercising these provisions threatens the financial stability of the federal savings and loan industry, the marketability on the secondary mortgage market of mortgages issued by federal associations, and ultimately the availability of financing to potential home buyers. Third, the preemption issue raised herein has significant policy implications in a number of related areas of federal regulation. For all of these reasons, probable jurisdiction should be noted and the judgment of the California Court of Appeal should be reversed.

A. This Case Affects Millions of Mortgage Transactions Potentially Involving Federal Savings and Loan Associations Across the Country.

There are approximately two thousand federal savings and loan associations in the United States. Each operates

under a charter issued by the Federal Home Loan Bank Board and is subject to extensive regulation by the Bank Board. (See *infra* at IIA.) In 1976, the Bank Board issued the regulations at issue, which specifically authorize all federal savings and loan associations to include and enforce due-on-sale clauses in their loan instruments.[5]

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[5]The regulation in force at the time of the instant transaction was codified at 12 C.F.R. § 545.6-11(f). It provided, in pertinent part:

> "*Due-on-sale clauses.* A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent." (Appendix at A-31)

The regulation was modified in certain minor respects in 1979 and re-codified at 12 C.F.R. § 545.8-3(f). The changes do not affect the merits of this case.

The preamble to the Board's 1976 regulation expressly states the Bank Board's intent to preempt the field:

> "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by § 545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in § 545.6-11(g) on the ground that such . . . avoidance of limitations is permissible under State law." (41 Fed. Reg. 18286 at 18287) (Appendix at A-36-37)

The 1976 regulations were not the first statement by the Bank Board in this area. In a scholarly Advisory Opinion issued in 1975, the Board stated, "(F)or many years the Board and its staff have been fully aware that Federal associations throughout the Nation were following the practice of using 'due on sale' clauses in their loan instruments, and have approved and publicly sanctioned such use." *In re Schott v. Mission Federal Savings and Loan Assn.*, Federal Home Loan Bank Board Resolution No. 75-647 (July 30, 1975) at 13.[6]

Most conventional mortgages issued since 1975 have utilized a uniform mortgage instrument, drafted by the Federal Home Loan Mortgage Corporation (FHLMC) and the Federal National Mortgage Association (FNMA), which contains a due-on-sale clause (Federal Home Loan Bank Board Resolution No. 76-100, 41 Fed.Reg. 6283 at 6286, Appendix at A-29-30). The deed of trust at issue in this case is the uniform FHLMC/FNMA instrument.[7] FHLMC estimates that approximately 80 percent of all conventional mortgages currently being originated by both federal and state-chartered lending institutions employ this standard document, with its due-on-sale clause.[8] While no

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[6]In 1970, the Federal Home Loan Mortgage Corporation found that over two-thirds of the conventional mortgage forms surveyed around the country (principally those used by savings and loan associations) contained due-on-sale clauses. *Id.*, at 29.

[7]A due-on-sale clause must be included in any mortgage instrument offered to either of these entities for resale. FNMA will not purchase a mortgage in which the due-on-sale clause is not fully enforceable by its terms, and FHLMC will purchase only those mortgages using the standardized FHLMC/FNMA loan instrument employed herein.

[8]Amicus Brief of Federal Home Loan Mortgage Corporation in Support of Pan American Federal, filed in the California Court of Appeal, First Appellate District, *Panko v. Pan American Federal Savings and Loan Association*, 1 Civ. 47918, at 10-11.

precise figures are available for federal savings and loan associations alone, in light of the Bank Board's 1976 regulations and the Board's long-time public approval of such clauses, it is likely that the vast majority of mortgages and deeds of trust originated by federal savings and loan associations in recent years contain due-on-sale clauses substantially identical to the one at issue here.

The decision below renders unenforceable nearly every due-on-sale clause in a mortgage originated by a California federal savings and loan association.[9] This holding affects hundreds of thousands of transactions in this state alone. Its impact is magnified by the fact that it has been followed by another California appellate court in *de la Cuesta v. Fidelity Federal Savings and Loan Association*, 121 Cal. App.3d 328, 175 Cal.Rptr. 467 (1981), and *Hehir v. Glendale Federal Savings and Loan Association*, 4 Civil 23309. Notices of appeal have been filed in both cases and appeals are presently pending before this Court.[10]

The questions raised by these California decisions potentially have national significance because several states have, by statute or judicial decision, prohibited enforce-

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[9]A due-on-sale clause is valid under California law only where the lender can demonstrate that it is "reasonably necessary to protect against impairment to its security or the risk of default." (*Wellenkamp v. Bank of America, supra*, 21 Cal. 3d 943 at 953, 148 Cal. Rptr. 379 at 386 (1978).

[10]One California appellate court has upheld the Federal preemption claim involved herein, expressly rejecting the rationale of the *Panko* and *de la Cuesta* courts. (*The People ex rel. Deukmejian v. Glendale Federal Savings and Loan Association*, 122 Cal.App.3d 860, 176 Cal. Rptr. 353 (1981).) Inexplicably, the California Supreme Court denied the State's petition for a hearing in that case but ordered the opinion depublished, letting stand directly conflicting decisions on the same legal point. Since the California Supreme Court has abdicated its responsibility to resolve the conflict in these decisions, this Court should do so.

ment of due-on-sale clauses.[11] Lower courts around the country are in disagreement on whether such state law applies to mortgages issued by federal savings and loan associations. Virtually all of the federal district courts to consider the question have found the state law preempted.[12] State courts are split on the issue.[13] Meanwhile, federal

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[11]See *e.g.*, Colorado (§ 38-30-165, C.R.S. 1973 (1980 Cum. Supp.)); Michigan (*Nichols v. Ann Arbor Savings and Loan Assn.*, 73 Mich. App. 163, 250 N.W. 2d 804 (1977); Florida (*First Federal Savings and Loan Ass'n. of Inglewood v. Lockwood*, 385 So. 2d 156 (Fla. App. 1980)); and Minnesota (*Holiday Acres No. 3 v. Midwest Federal Savings and Loan Ass'n. of Minneapolis*, 308 N.W.2d 471 (Minn. 1981)).

[12]*First Fed. Sav. and Loan Ass'n of Gadsden County v. Peterson*, 516 F. Supp. 732 (N.D. Fla. 1981); *Dantus v. First Federal Savings and Loan Ass'n of Denver*, 502 F. Supp. 658, 661 (D. Colo. 1980); *Williams v. First Federal Savings and Loan Ass'n of Arlington*, 500 F. Supp. 307 (E.D. Va. 1980), *aff'd*, 651 F.2d 910 (1981); *Bailey v. First Federal Savings and Loan Ass'n of Ottawa*, 467 F. Supp. 1139 (C.D. Ill. 1979); *First Federal Savings and Loan Ass'n of Phoenix v. Development & Management Enterprises, Inc.*, No. CIV 79-880 PHX-EHC (D. Ariz., April 2, 1981) [unreported opinion]; *Price v. Florida Federal Savings and Loan Ass'n.*, No. 79-974-CIV-J-M (M.D. Fla. 1981) [unreported decision] and *Great Western Union Fed. Sav. and Loan Ass'n v. Walters*, No. C 79-906V (W.D. Wash., June 18, 1980) [unreported opinion]. See also *Conference of Federal Savings & Loan Ass'ns. v. Stein*, 495 F. Supp. 12 (E.D. Cal. 1979), *rev'd on other grounds*, 79-4818 (9th Cir. 1981); *Glendale Federal Savings & Loan Ass'n. v. Fox*, 459 F.Supp. 903 (C.D. Cal. 1978), 481 F.Supp. 616 (C.D. Cal. 1979), *rev'd on other grounds*, 79-3573 (9th Cir. 1981).

[13]A number of state courts have found in favor of federal preemption. See *Haugen v. Western Fed. Sav. and Loan Ass'n of Denver*, No. 80 CA 9551 (Colo. Ct. App., April 30, 1981) [unreported opinion] (appeal pending); *First Federal Sav. and Loan Ass'n of Rochester v. Jenkins*, No. 80-354 (State of N.Y. Supreme Court, County of Tompkins, Feb. 19, 1981) [unreported opinion]; *Northwestern Fed. Sav. and Loan Ass'n v. Ternes*, No. 12,694 (Dist. Ct. So. Cen. Jud. of N.D., March 12, 1981) [unreported opinion]; and *Fischer v. First Fed. Sav. and Loan Ass'n of Lewanee County*, No. 80-01-756 (Circuit Ct., Lewanee Co., Mich., Jan. 19, 1981).

savings and loan associations have no certainty as to the validity of these acceleration clauses in the millions of mortgages which they hold, and they face conflicting rulings across the country.

Only a decision by this Court can bring clarity and uniformity to the federal savings and loan associations throughout the country on this important question.

B. Failure to Uphold the Enforceability of Due-on-Sale Clauses May Threaten the Financial Stability of the Federal Savings and Loan Industry and the Availability of Credit to Home Buyers.

It is common knowledge that the savings and loan industry is already in precarious financial straits, squeezed be-

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By contrast, other state courts have upheld the validity of applying state law to federal savings and loan associations to preclude enforcement of due-on-sale clauses, notwithstanding the Bank Board's regulations. (See *Holiday Acres No. 3 v. Midwest Federal Savings and Loan Ass'n. of Minneapolis*, 308 N.W.2d 471 (Minn. 1981); *First Federal Savings and Loan Ass'n. of Inglewood v. Lockwood*, 385 So.2d 156 (Fla. App. 1980); *de la Cuesta v. Fidelity Federal Savings and Loan Ass'n.*, 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (1981).)

Other states have held that due-on-sale clauses are not unreasonable restraints on alienation and may be enforced by all associations. (See e.g., *Dunham v. Ware Savings Bank*, ... Mass. ..., 423 N.E.2d 998 (1981); *Malouff v. Midland Federal Sav. & Loan Ass'n*, 181 Colo. 294, 509 P. 2d 1240 (1973); *Baker v. Loves Park Sav. & Loan Ass'n*, 61 Ill.2d 119, 333 N.E.2d 1 (1975); *Occidental Savings and Loan Ass'n v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980); *First Commercial Title, Inc. v. Holmes*, 92 Nev. 363, 550 P.2d 1271 (1976); *Century Federal Sav. & Loan Ass'n v. Van Glahn*, 144 N.J. Super. 48, 364 A. 2d 558 (1976); *Stith v. Hudson City Sav. Institution*, 63 Misc.2d 863, 313 N.Y.S.2d 804 (1970); *Crockett v. First Fed. Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E.2d 580 (1976); *Gunther v. White*, 489 S.W. 2d 529 (Tenn., 1973); *Mutual Fed. Sav. & Loan Ass'n v. Wisconsin Wireworks*, 71 Wis. 2d 531, 239 N.W. 2d 20 (1976).

tween the current double-digit interest rates which must be paid to investors and the low return on older mortgages. Failure to sustain the right of federal savings and loan institutions to enforce due-on-sale clauses will seriously aggravate their current economic difficulties and will raise the cost of borrowing to home buyers.

The threat to the federal associations' solvency from impairment of the due-on-sale clause has been predicted by the Bank Board itself, the very agency charged with maintaining a fiscally sound federal savings and loan system. In its 1975 *Schott* opinion, the Board wrote:

> "The elimination of the 'due on sale' clause will, in the Board's view, endanger the financial stability of the association, and generally require it to charge higher interest rates on home loans across-the-board to compensate for its substantial loss of earnings directly resulting from elimination of its right to accelerate." (Federal Home Loan Bank Board Resolution 75-647 at 27.)

In the preamble to its proposed regulations in 1976, the Bank Board expanded on its concern, stating:

> "The Board also is of the view that elimination of the due on sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally." (Federal Home Loan Bank Board Resolution 76-100, 41 Fed. Reg. 6283 at 6285.) (Appendix at A-26-27)

As the Board pointed out in its proposed regulations, due-on-sale clauses enable the lending savings and loan association to "adjust its loan portfolio towards current market rates, thus safeguarding and protecting the financial stability of the association and permitting it to make new

home loans at lower interest rates than otherwise would be necessary to maintain an adequate yield on its mortgage portfolio . . ." (41 Fed. Reg. 6283 at 6285.) (Appendix at A-26) Upon the sale of the mortgaged property, the savings and loan associations may require the original borrower to repay the loan in full so that the money may be loaned out again at current interest rates, or may insist that the new purchaser assume the existing loan at an inincreased interest rate in line with prevailing market rates.[14] Curtailing the associations' right to exercise their due-on-sale clauses will deprive them of this opportunity to reset interest rates at current levels and restrict their income from mortgages to levels far below what they must pay out to current investors.[15]

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[14]The Bank Board has stated that it expects that no federal association will request an increase in the interest rate beyond the then prevailing rate on comparable new loans. (12 C.F.R. § 5569(d))

[15]On July 23, 1981 the Board reiterated its long-standing policy regarding the preemptive nature of its regulations authorizing federally chartered savings and loan associations to include due-on-sale clauses in their mortgage loan contracts and to exercise such clauses subject only to express limitations imposed by the Board. In its statement of policy, the Board stressed:

> "Federal associations are obliged to take reasonable precautions to protect themselves against the economic risks associated with mortgage lending, including the risk that the cost of lendable funds will exceed the yield from existing mortgage loans, and that sharply rising interest rates will substantially reduce the value of existing mortgage assets. In this connection, the Board has determined that the due-on-sale clause normally is a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments. Consequently, the Board for many years has authorized due-on-sale clauses for use by Federal associations. . . ." (12 C.F.R. § 556 9(f), Appendix at A-22-23)

Elimination of the due-on-sale clause will also seriously impair the ability of federal associations to sell their mortgages on the secondary mortgage market. Under the Emergency Home Finance Act of 1970, 12 U.S.C. § 1451, *et seq.*, the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association purchase conventional mortgages from lending institutions and resell them to investors. The funds received from those sales are used to buy more mortgages from the savings and loan associations, thus providing the primary lenders with a steady supply of fresh capital for new loans. If due-on-sale clauses are unenforceable, it will be more difficult or impossible for federal savings and loan institutions to sell those mortgages on the secondary market. As the Bank Board determined in its 1976 resolution, proposing the due-on-sale regulations:

> "The Board is . . . of the view that elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans which otherwise would be available." (Bank Board Resolution No. 76-100, 41 Fed. Reg. 6283 at 6285, Appendix at A-27.)

The ultimate victims of elimination of due-on-sale clauses will be home buyers. Since most houses are sold long before the end of the mortgage term, due-on-sale provisions have enabled lending institutions to make long-term loans, secure in the knowledge that those loans will be repaid when the property is sold. If due-on-sale clauses are unenforceable, federal savings and loan institutions will be

forced to forego long-term loans.[16] Buyers will face higher interest rates as federal associations will necessarily have to increase charges for new loans to offset their inability to accelerate on older mortgages. Finally, home buyers may be unable to obtain any financing because of the decreased flow of funds in the secondary mortgage market. The Bank Board warned of these serious effects when it proposed its due-on-sale regulations in 1976. Writing of the higher interest rates or the reduction of fresh funds in the secondary mortgage market which would result from prohibition of due-on-sale clauses, the Board declared:

> "The Board is concerned that such higher rates and/or charges could adversely affect home buyers generally, and particularly younger families who are purchasing their first home—the group which ordinarily can least afford the additional expenses. . . . Any such reduction [of new funds from the secondary market] would adversely affect home buyers, the housing industry and the national economy. Lastly, the Board is of the view that elimination of the due on sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers."
>
> (Bank Board Resolution No. 76-100, 41 Fed. Reg. 6283 at 6285, Appendix at A-27.)

The Home Owners' Loan Act of 1933 (12 U.S.C. § 1464 (a)(1)) (HOLA) gave to the Federal Home Loan Bank Board the authorization and responsibility of adopting rules and regulations for the "operation" of Federal savings and loan associations, "giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." (Appendix at A-19)

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[16] FNMA has begun requiring a seven-year call provision in mortgages secured by property in those states restricting enforcement of due-on-sale clauses.

This statute was adopted in order to establish a nationwide system of thrift institutions which would be fiscally sound under rules to be promulgated by the Federal Home Loan Bank Board.

The Bank Board acted under the express mandate of Congress when it determined that due-on-sale clauses were vital to the financial stability of federal savings and loan associations and were in the best interest of home buyers and the national economy. The Board has determined that due-on-sale clauses are among the "best practices" of home-financing institutions in the United States. As the duly authorized body empowered by Congress to determine the "best practices" necessary for the proper "operation" of federal savings and loan associations, the Board and not the fifty state legislatures and courts must be free to establish policy for the federal savings and loan industry. Probable jurisdiction should be noted in order to avoid the frustration of the Board's policies and the drastic consequences to the federal savings and loan industry and home buyers across the country.

II. THE DECISION BELOW FINDING NO PREEMPTION CONFLICTS IN PRINCIPLE WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the California Court of Appeal that HOLA and the Bank Board's due-on-sale regulations do not preempt California restraint on alienation law is hopelessly at odds with the preemption decisions of this Court over the past 35 years. The California Court ignored Supreme Court precedents in failing to find that the pervasive federal regulatory control of federal savings and loan associations evidenced a Congressional intent to preempt, in holding that a valid Federal administrative regulation may not preempt contrary state law, and in failing to see the obvious conflict between the Bank Board's regulations and California law.

A. The Home Owners' Loan Act Establishes a Pervasive Scheme of Federal Regulation Over Federal Savings and Loan Associations, Leaving No Room for State Regulation.

Under the Supremacy Clause to the United States Constitution, the laws of the United States are the supreme law of the land; and "the Judges in every State shall be bound thereby, anything in the laws of any State to the contrary notwithstanding." (U.S. Const., Article VI, cl. 2) Congressional intent to preempt state law will be found where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (*Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

The Home Owners' Loan Act of 1933 is such a comprehensive scheme. In enacting HOLA, Congress gave the Federal Home Loan Bank Board authorization "under such rules and regulations as *it may prescribe*, to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'Federal Savings & Loan Associations' . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States." (12 U.S.C. § 1464(a)(1).) (Appendix at A-19) (emphasis added) This broad charter gave the Board the power and responsibility of determining what *it* considered to be the best practices of local mutual thrift and home financing institutions in this country and implementing these practices by such rules and regulations as *it* might prescribe. As one federal court has observed, "[i]t would not be possible [for Congress] to give a much broader mandate to the Board." (*Smith v. Jaques*, No. 75-939 (D. Ore. Dec. 8, 1976).)

In the years which have elapsed since HOLA was adopted, the Bank Board has fulfilled its Congressional mandate to prescribe rules and regulations for the organization *and* operation of Federal associations "in order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes." (12 U.S.C. § 1464(a)(1).) As the court below conceded, state and lower Federal court decisions have uniformly agreed that the Board has adopted comprehensive rules and regulations covering all aspects of every Federal savings and loan association "from its cradle to its corporate grave." (See e.g. *Meyers v. Beverly Hills Federal Savings & Loan Assn.*, 499 F.2d 1145, 1147 (9th Cir. 1974); *People v. Coast Federal Savings & Loan Ass'n.*, 98 F.Supp. 311, 316 (S.D. Cal. 1951).) In *Conference of Federal Savings & Loan Associations v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), aff'd. 445 U.S. 921 (1980), the Court held that the regulatory control over Federal savings and loan associations was so pervasive as to leave no room for state regulatory control. This Court affirmed without opinion.[17]

The California court recognized this unbroken line of precedent but distinguished prior cases on the ground that they dealt solely with the "internal" affairs of federal savings and loan associations while due-on-sale clauses presumably affect their "external" affairs. (Appendix A at A-7-8.) That distinction is false. While due-on-sale clauses do regulate the relationship between lending institutions and their borrowers and are in that sense "external", the major purpose of due-on-sale clauses is, according to the Bank Board, to ensure the financial stability of federal

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[17]This Court's affirmance of the result is a decision on the merits, entitled to precedential weight. (*Meek v. Pittenger*, 421 U.S. 349, 367, n.16 (1975); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).)

savings and loan associations—a decidedly "internal" concern. (See Part IB, *supra,* Bank Board Resolution No. 76-100, 41 Fed. Reg. 6283 at 6285, and 12 C.F.R. § 556.9 (f).)

The court's "internal" vs. "external" analysis is not only economically unsound; it is legally fallacious, as well. One of the allegedly "internal" cases cited by the court below was *Meyers v. Beverly Hills Federal Savings & Loan Ass'n.,* 499 F.2d 1145 (9th Cir. 1974). In *Meyers,* the Court of Appeals for the Ninth Circuit held that the Bank Board's regulation of federal savings and loan associations was so comprehensive as to invalidate a California law governing prepayment penalties imposed on borrowers by federal associations. Certainly, prepayment penalties are every bit as "external" as due-on-sale clauses since both deal with the rights and obligations between the savings and loan associations and their borrowers. Yet, prepayment penalties, like due-on-sale clauses, also contribute to the economic viability of the institutions and are equally "internal".

In sum, pursuant to HOLA's express statutory mandate, the Bank Board has established a comprehensive scheme of regulation over all aspects of the federal savings and loan industry. This all-encompassing system leaves no room for state regulation. Moreover, as will be discussed below, the Board has, pursuant to the broad powers granted by Congress, enacted regulations covering the specific subject in question. Under principles enunciated by this Court, the Board's regulations preempt the field and prohibit contrary state action.

B. The Bank Board's Due-on-Sale Regulations Preempt Contrary State Law.

As part of its comprehensive regulatory control of federal savings and loan associations, the Bank Board in 1976

promulgated the regulations here at issue, which authorize federal associations to include and exercise due-on-sale clauses contained in their loan instruments. (12 C.F.R. § 545.6-11 (f) and (g), 41 Fed. Reg. 18286, now recodified at 12 C.F.R. 545.8-3(f) and (g).)

In proposing the regulations, the Board commented:

> "It is the position of the Board that 'due on sale' clauses are authorized for Federal associations under § 545.6-11, the Board regulation governing the terms of the loan documents used by Federal associations. . . .
>
> "The Board notes that the majority of courts which have considered the matter have upheld the validity of due on sale clauses used by savings and loan associations. However, recently the authority of Federal associations to exercise their contractual due on sale clauses has been the subject of controversy and litigation in certain States. Therefore, the Board deems it desirable to amend § 545.6-11 to clarify the existing authority of Federal associations to include due on sale clauses in their loan contracts with borrowers and to exercise such clauses. The Board also deems it desirable to include in such amendment limitations on the exercise by Federal associations of their existing due on sale authority as to certain future loans." (41 Fed. Reg. 6283 at 6285.) (Appendix at A-25, 27)

In adopting the final regulations, the Board expressed its clear intent to preempt state law in this area:

> "[I]t was and is the Board intent to have . . . due on sale practices of Federal associations governed *exclusively* by Federal law." (Preamble to 12 C.F.R. § 545.6-11, 41 Fed. Reg. 18286 at 18287) (Appendix at A-36) (emphasis added)

The Court below conceded the Bank Board's "unqualified intention" to preempt state law (Appendix at A-6), but held that the Board's intent was insufficient to establish preemption in the absence of clear Congressional intent. That view squarely conflicts with prior decisions of this Court.

Free v. Bland, 369 U.S. 663 (1962), is directly on point. In *Free*, a federal statute authorized the Secretary of the Treasury to issue savings bonds "in such forms . . . and under such terms and conditions . . . as [he] may from time to time prescribe." The Treasury Secretary issued regulations establishing a rule of survivorship to govern co-owners of savings bonds, although the statute was entirely silent on that point. These regulations conflicted with Texas law. Holding that federal administrative regulations have the force of federal law,[18] the Court ruled that the Treasury regulations preempted Texas law. In so holding, the Court specifically relied on several informal Treasury documents (a statement, a letter and a circular) which indicated that the survivorship regulation was intended to establish a nationwide rule preempting state law. (369 U.S. at 667-8 and n. 7.)[19]

Free teaches that a Federal regulation may have preemptive force even where the topic covered by the regulation is not mentioned in the authorizing statute. *City of Burbank v. Lockheed Air Terminal, Inc., supra*, 411 U.S.

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[18] *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956). See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 536 (1977); *Public Utilities Comm'n of California v. United States*, 355 U.S. 534, 542 (1958).

[19] This should lay to rest any contention that the publication of the Bank Board's preemptive intention in the regulation's preamble rather than in the portion codified, nullifies that intent. At any rate, the Bank Board's intent that the due-on-sale clause should preempt state law has recently been codified. (12 C.F.R. § 556.9(f).)

624, further underscores the power of an administrative rule to preempt where Congressional intent is disputed. In *City of Burbank,* a five-justice majority of this Court held that Federal law dealing with aircraft noise had so pervaded the field that Congress had impliedly preempted local ordinances. To reach that result, the majority relied heavily on the broad grant of authority to the FAA Administrator. The four dissenting justices disagreed with the majority's analysis of legislative history but acknowledged that preemption could arise where the federal agency had promulgated regulations specifically dealing with the particular subject. The dissent stated:

> "Clearly Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of the Federal Aviation Administration by 49 USC § 1431 is sufficient to authorize him to promulgate regulations effectively pre-empting local action. But neither Congress nor the Administrator has chosen to go that route. Until they do, the ordinance of the city of Burbank is a valid exercise of its police power." (411 U.S. 624, 653.)

Thus, preemption may occur where, as in the instant case, Congress has granted a federal agency *broad powers* to regulate the general field; and the agency has pursuant to those powers enacted regulations which covered the *specific subject.* (See also *United States v. Shimer,* 367 U.S. 374 (1961); *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187 (1956); *Nolan v. de Baca,* 603 F.2d 810 (10th Cir. 1979); *Brookhaven Cable T.V., Inc. v. Kelly,* 573 F.2d 765 (2nd Cir. 1978).) The court below erred by failing to follow this well-established principle.

C. California Law, Which Severely Restricts the Exercise of Due-on-Sale Clauses by Federal Savings and Loan Associations, Conflicts with Federal Law and is Preempted.

The court below found no conflict between the Bank Board rules and California law. That is patently wrong. Federal regulations permit federal associations to include and exercise due-on-sale clauses in their loan instruments. California law prohibits the enforcement of such clauses. Even though there is in fact and in law a clear conflict and inconsistency between the permissible federal regulations and the impermissible state regulation, the California Court of Appeal concluded: "[T]he Federal loan association is not faced with physical impossibility in complying with the two regulatory schemes. . . . There is no 'inevitable collision' between the two regulations." (Appendix at A-8)

The court reached this Alice-in-Wonderland result on the ground that the federal Bank Board rule simply permitted, but did not require, federal savings and loan associations to enforce the due-on-sale clauses in their mortgages. In short, the California court found no conflict only by forcing the federal associations to relinquish the rights granted by federal law—rights which the Bank Board has found essential to the associations' continued solvency.

The basic standard for determining whether state law conflicts with federal law so as to be preempted is whether the state law "stands as an obstacle to the accomplishment and execution of the *full* purposes and objectives of Congress." (*Ray v. Atlantic Richfield Co.*, 433 U.S. 151 (1978); *Hines v. Davidowitz*, 312 U.S. 52, 67-8 (1941) (emphasis added).) Put slightly differently, "any state legislation which frustrates the *full* effectiveness of federal law is

rendered invalid by the Supremacy Clause." (*Perez v. Campbell*, 402 U.S. 637, 652 (1971).) (emphasis added.)

California Civil Code § 711, as interpreted in *Wellenkamp v. Bank of America, supra*, 21 Cal.3d 943 (1978) and applied below, prohibits a federal savings and loan association from exercising a due-on-sale clause except where necessary to protect the lender's security interest against a non-creditworthy purchaser. Bank Board regulations permit exercise of the acceleration clause for two additional purposes: to raise interest rates in order to increase portfolio yields and to protect the marketability of an association's mortgages on the secondary market. (Bank Board Resolution No. 76-100, 41 Fed. Reg. 6285; see Part IB, *supra*.) California law thus stands as an obstacle to the accomplishment of two purposes authorized by federal law.

In *Wellenkamp*, the California Supreme Court specifically rejected the contention that the lender's interest in maintaining its loan portfolio at current interest rates justifies the restraint imposed by exercise of a due-on-sale clause upon transfer of title in an outright sale. (21 Cal.3d 943 at 952; 148 Cal.Rptr. 379 at 385) The Bank Board, however, has reached the contrary conclusion.

Public Utilities Commission of California v. United States, supra, 355 U.S. 534 establishes the fallacy in the California court's attempt to make preemption hinge on whether the federal law is mandatory or permissive. In that case, a federal statute established a comprehensive policy governing procurement of goods or services by federal agencies. While competitive bidding was the general policy, the act provided that, in certain circumstances, the head of the agency could negotiate a purchase or contract without taking bids. Various agencies promulgated regulations which entrusted procurement officers with wide discretion to determine when to negotiate for adjustments

in the rates of commercial carriers. However, a California statute provided that a common carrier had to secure the approval of the California Public Utilities Commission before it could transport property for federal agencies at reduced rates. This Court struck down the state statute, holding that California could not place a prohibition on the federal government. The fact that the conflict arose only when federal officials exercised their discretion to negotiate lower rates was not deemed significant.

The instant case provides an even more dramatic interference with federal law than *Public Utilities Commission.* There federal officials had to submit their discretionary decisions to state review but presumably could have secured state approval. Here a federal savings and loan association that wants to exercise a due-on-sale clause in order to protect its financial stability can never win state sanction.

The bottom line in this case is that California is forbidding a federal savings and loan association from exercising rights provided by federal law. This it may not do. (See *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co.*, ... U.S. ....., 67 L.Ed.2d 258, 101 S.Ct. 1124 (1981).)

The Bank Board and not the fifty state legislatures or fifty state courts has the responsibility of determining the "best practices" of federal home financing institutions. The Bank Board has determined that federal associations should be free to enforce due-on-sale clauses to protect their financial stability and prevent impairment of their ability to sell mortgages on the secondary market. California law frustrates the full effectiveness of federal law. It may not do so. The Bank Board's regulations prevail; California law is preempted.

III. PAN AMERICAN DID NOT WAIVE FEDERAL LAW.

The subject deed of trust is a standard FHLMC/FNMA loan instrument which contains both "uniform" and "non-uniform" covenants. The uniform covenants are intended for nationwide use, while the non-uniform covenants are tailored to particular state mortgage requirements. (Appendix at A-9.) Paragraph 15 of the deed of trust provides:

> "This form of deed of trust combines uniform covenants designated for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or Note conflicts with applicable law, such conflict shall not affect other provisions. . . ."

Paragraph 15 is a "uniform" covenant. Paragraph 17, the "due-on-sale clause", is similarly a "uniform" covenant.

The court below held that Uniform Covenant 15, a general provision, constituted a waiver of Uniform Covenant 17, the specific clause applicable herein. In reaching this decision, the California court erroneously failed to recognize that federal law is as much a part of state law as enactments of the state legislature. More than one hundred years ago, this Court in *Hauenstein v. Lynham,* 100 U.S. 483, 490 (1880), stated:

> "It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity."

Regulations of federal administrative agencies such as the Federal Home Loan Bank Board constitute federal law. (*Free v. Bland*, 369 U.S. 663, 668 (1962); *Public Utilities Commission of California v. United States*, 355 U.S. 534, 542 (1958).) These regulations are a part of the law of California; California is part of the Union; and federal law is a part of the law of that jurisdiction.[20]

The instant case involves a uniform covenant designed for national use. It makes no sense for the court below to hold that FHLMC and FNMA incorporated as a *uniform* covenant in all mortgages purchased through a nationwide program a clause which subjects FHLMC and FNMA exclusively to state law and deprives federal lenders of protections afforded to them by the Bank Board. Uniform Covenant 15 was not intended to waive rights specifically granted in Uniform Covenant 17.[21]

The California court's waiver analysis was simply a device of a state court seeking to substitute its judgment for that of the federal regulatory body empowered by Congress to adopt uniform loan practices for the entire coun-

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[20]Moreover, when federal preemption of a legislative field occurs, any state law is inapplicable to an issue which arises in that field. (*Meyers v. Beverly Hills Federal Savings & Loan Ass'n.*, 499 F.2d 1145 (9th Cir. 1974).) California Civil Code Section 711 and *Wellenkamp v. Bank of America*, 21 Cal.3d 943 (1978), are inapplicable since they conflict with the Bank Board regulations which preempt the field.

[21]FHLMC has stated that Uniform Covenant 15 was inserted "to state a rule of choice of law for potentially competing state laws in those areas where state laws do govern (such as homestead rights, dower, and descent in distribution of intestate property), not to express a preference for state law to the exclusion of federal law." (Amicus Curiae Brief of Federal Home Loan Mortgage Corporation in support of Pan American Federal, p. 52, 1 Civil 47918, California Court of Appeal, First Appellate District.)

try The lower court's decision on waiver is wrong. Probable jurisdiction should be noted and the decision of the lower court should be reversed.

IV. THE DECISION BELOW IS A FINAL JUDGMENT UNDER 28 U.S.C. § 1257.

The decision below constitutes a final judgment for purposes of 28 U.S.C. § 1257, even though the California court reversed the summary judgment and remanded the case for further proceedings. The threshold federal issue involved herein—the preemption of state law by the Home Owners' Loan Act and Federal Home Loan Bank Board regulations—has been finally decided by the California courts and is too important to be denied review. Reversal of the state court will be preclusive of any further litigation; and a refusal to immediately review the California court decision will seriously erode the federal policy enunciated by the Federal Home Loan Bank Board. Any additional proceedings in the state court will not require the decision of any other federal questions, nor will the federal questions presented herein be mooted or otherwise affected by such proceedings. Immediate review would be the best way to avoid the mischief of economic waste and of delayed justice. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). See also *State of New York v. Cathedral Academy*, 434 U.S. 125 (1977); *City of New Orleans v. Dukes*, 427 U.S. 297 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973).)

CONCLUSION

The questions presented herein are of nationwide importance. The financial stability of the federal savings and loan industry and the ability of the Federal Home Loan Bank Board to enact effective regulations to protect its stability are at issue. The availability of long-term home financing and the marketability of mortgages on the secondary mortgage market are also at stake.

On a broader level, this case involves the nullification of federal law by state courts, in disagreement with the federal agency empowered by Congress to adopt the "best practices" for the proper "operation" of the associations which that agency was directed to regulate.

There is a conflict in the decisions which this Court should resolve. Only this Court may resolve that conflict. Only this Court may determine the proper application of the Supremacy Clause to the questions involved herein. Appellants respectfully urge this Court to note probable jurisdiction and to reverse the decision of the California Court of Appeal.

Dated: November 10, 1981

Respectfully submitted,

ROBERT ALLEN SELIGSON
Counsel of Record for Appellants

ELLEN LAKE
Of Counsel

(Appendicies follow)

Appendix

Appendix A

[Civ. No. 47918. First Dist., Div. One. June 1, 1981.]

Stanley E. Panko et al., Plaintiffs and Appellants, v. Pan American Federal Savings and Loan Association et al., Defendants and Respondents.

OPINION

Racanelli, P. J.—In this appeal we address the question whether the rule announced by our Supreme Court in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943 [148 Cal.Rptr. 379, 582 P.2d 970] applies with equal force to a federally chartered savings and loan association. We hold that *Wellenkamp* applies; accordingly, we reverse the judgment.

Facts

Joseph and Sandra Karp were owners of a commercial building in San Mateo. In November 1977 they refinanced the property, obtaining a loan from Pan American Federal Savings and Loan Association for $161,000, bearing interest at the rate of 10 percent per annum, secured by a deed of trust.[1] The deed of trust contained a standard due-on-sale clause providing for accelerated payment in the event of sale.

In June 1978 the Karps sold the property to plaintiffs, Stanley Panko and George Sinclair, who took title to the property "subject to" the Pan American deed of trust.

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[1]The refinancing was part of an option agreement between the Karps and plaintiffs. An abstract of option agreement was recorded on November 13, 1977. A termination of option agreement was recorded on December 2, 1977. An abstract of option agreement was rerecorded on December 5, 1977. Thus, at the time of the Karps' refinancing (Nov. 28, 1977), Pan-American had constructive notice of plaintiffs' option to purchase the property.

Plaintiffs tendered a timely monthly payment due to Pan American in July 1978, but Pan American declined to accept it. Acting under the authority of the due-on-sale clause, Pan American demanded full payment of the loan balance.

On August 18, 1978, Pan American recorded a notice of default citing the Karps' "failure to pay Interest and Principal payments." On November 21, 1978, plaintiffs filed a complaint for declaratory and injunctive relief seeking to enjoin Pan American from enforcing the due-on-sale clause. Thereafter, Pan American moved for summary judgment on the ground that federal statutes and regulations governing federally chartered savings and loan associations preempted California law and permitted enforcement of the due-on-sale clause. The trial court granted the motion and dismissed the action. This appeal ensued.

Background

In recent years the validity of due-on-sale clauses has been a matter of considerable controversy in state and federal courts. In California our Supreme Court has determined that enforcement of a due-on-sale clause upon occurrence of an outright sale constitutes an unreasonable restraint on alienation "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." (*Wellenkamp v. Bank of America, supra,* 21 Cal.3d at p. 953.) The court's decision was grounded on Civil Code section 711,[2] foreshadowed by two earlier interpretations of that statute. (See *Tucker v. Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.2d 1169] [due-on-sale clause not automatically enforceable upon execution of installment sale contract]; *LaSala v. American Sav. & Loan Assn.*

[2]Section 711 of the Civil Code provides: "Conditions restraining alienation, when repugnant to the interest created, are void."

(1971) 5 Cal.3d 864 [97 Cal.Rptr. 849, 489 P.2d 1113] [acceleration clause not automatically enforceable upon creation of junior encumbrance].)

Here, Pan American concedes that it can make no showing of an impairment to its security or risk of default as a result of the outright sale of the property to plaintiffs. Consequently, under California law the due-on-sale clause contained in the deed of trust herein would not be enforceable.[3] Pan American, a federally chartered savings and loan association, contends that it can not be bound by California law since it is exclusively governed by regulations of the Federal Home Loan Bank Board (Board) which preempt conflicting state laws.

In 1933 the Home Owners' Loan Act (12 U.S.C. §§ 1461-1470) was enacted by Congress creating the Board and authorizing the establishment of federal savings and loan associations. While the associations are specifically empowered to extend real estate loans (12 U.S.C. § 1464 (c)(1)(B) and (c)(2)(A)), the statute is silent with respect to due-on-sale clauses or other loan details.

The Board is statutorily authorized to promulgate regulations[4] and has shown no reluctance to do so. (See 12 C.F.R. §§ 541-546.) The first specific mention of due-on-sale clauses, however, did not appear until a regulation was

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[3]We note that in *Wellenkamp* the property was an owner-occupied single family dwelling, whereas here the property is investment commercial property. While we are aware that a similar question is presently pending before the California Supreme Court (*Dawn Investment Co. v. Superior Court* (L.A. 31413) hg. granted April 29, 1981), we perceive no sound reasons to now restrict the *Wellenkamp* doctrine exclusively to residential property.

[4]"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized under such rules and regulations

enacted, effective July 1, 1976, providing as follows: "An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." (12 C.F.R. § 545.6-11(f), amended and recodified at § 545.8-3(f) (1980).)

The pivotal question to be decided is whether the federal regulation overrides state law embodied in California Civil Code section 711, as interpreted in *Wellenkamp*.

Federal Preemption

The preemption doctrine arises under the supremacy clause of the federal Constitution which states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law

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as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks' (but only in the case of institutions which, prior to conversion, were State mutual savings banks located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (12 U.S.C. § 1464 (a)(1).)

of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) But the enumerated powers of the federal government are expressly limited: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. Const., Amend. X.) The United States Supreme Court has exhibited considerable restraint in finding preemption of state law by requiring either "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] . . . evidence of a congressional design to preempt the field." (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed.2d 248, 256, 83 S.Ct. 1210]; accord *People v. Conklin* (1974) 12 Cal.3d 259, 264 [114 Cal.Rptr. 241, 522 P.2d 1049], app. dism. 419 U.S. 1064 [42 L.Ed.2d 661, 95 S.Ct. 652].)

With reference to congressional intent, the United States Supreme Court has declared that a state regulation exercising the state's "historic police powers" is not displaced by federal law "unless that was the clear and manifest purpose of Congress." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 [51 L.Ed.2d 604, 614, 97 S.Ct. 1305]; *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 1459, 67 S.Ct. 1146].) Counsel have not cited nor has our own research disclosed any reported evidence of a clear congressional mandate that federal law shall control the subject matter herein. While the Congress has unequivocally expressed its preemptive design in relation to specific areas of savings and loan association activities,[5]

[5]The Home Owners' Loan Act specifically provides that federal savings and loan associations are exempt from state limitations on the number of branch offices (12 U.S.C. § 1464(a)(1)), but are not exempt from more stringent state laws on neighborhood discrimination or consumer credit protection. (*Ibid.*) Further, federal savings and loan associations are exempt from state taxation greater than that imposed on local financing institutions. (*Id.*, at § 1464(h).)

the Home Owners' Loan Act makes no reference to the subject of due-on-sale clauses.

It is clear that the Board has manifested its unqualified intention that the adopted regulations and implementing policy relating to due-on-sale clauses shall occupy a preemptive position over conflicting state law provisions.[6] Such expression of administrative intent was found controlling in *Glendale Fed. Sav. & Loan Ass'n. v. Fox* (C.D. Cal. 1978) 459 F.Supp. 903, judgment entered (1979) 481 F.Supp. 616, appeal pending (9th Cir. 1979). But we cannot equate the *Board's* expression of intent with the requisite congressional intent since the ultimate question to be answered is "whether *Congress* has . . . ordained that the state regulation shall yield." (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at p. 146 [10 L.Ed.2d at p. 259]; italics added.)

But despite the lack of express congressional design, federal law by implication may operate to the exclusion of state law "where compliance with both federal and state regulations is a physical impossibility" or where there is an "impossibility of dual compliance . . ." resulting in ". . . an inevitable collision between two schemes of regulation, . . ." (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at pp. 142-143 [10 L.Ed.2d at p. 257].)

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[6]That intent is expressed in the following language: "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by § 545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in § 545.6-11(g) on the ground that such . . . avoidance of limitations is permissible under State law." (Preamble to 12 C.F.R. § 545.6-11, 41 Fed. Reg. 18287 (May 3, 1976).)

In an early case a federal district court—confronted with the question whether a federally chartered savings and loan association was required to obtain a state certificate to transact business in the state—held in favor of federal preemption reasoning that: "The [Home Loan Bank] Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." (*People, etc. v. Coast Federal Sav. & Loan Ass'n.* (S.D. Cal. 1951) 98 F.Supp. 311, 316.) This broad declaration of lifetime supremacy has been cited with approval in a number of subsequent decisions uniformly holding that state law may not regulate or otherwise interfere with the internal affairs of federal savings and loan associations. (See e.g. *Conference of Federal Sav. & Loan Ass'ns v. Stein* (9th Cir. 1979) 604 F.2d 1256, affd. 445 U.S. 921 [63 L.Ed. 2d 754, 100 S.Ct. 1304] [proceedings for credit discrimination]; *Kupiec v. Republic Federal Savings & Loan Ass'n* (7th Cir. 1975) 512 F.2d 147, 150 [use of membership records]; *Meyers v. Beverly Hills Federal Savings & Loan Ass'n* (9th Cir. 1974) 499 F.2d 1145, 1147 [prepayment penalties]; *Rettig v. Arlington Hts. Fed. Sav. & Loan Ass'n* (N.D.Ill. 1975) 405 F.Supp. 819, 823 [fiduciary obligations of directors and officers]; *City Federal Savings & Loan Ass'n v. Crowley* (E.D.Wisc. 1975) 393 F.Supp. 644, 655 [fees received by directors and officers]; *Kaski v. First Fed. S & L Ass'n of Madison* (1976) 72 Wis.2d 132 [240 N.W.2d 367] [interest rate escalation]; *Sears v. First Federal Savings and L. Ass'n of Chicago* (1971) 1 Ill.App. 3d 621 [275 N.E.2d 300] [trust accounts for taxes and insurance]; see also *Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n* (1978) 281 Ore. 533 [577 P.2d 477], cert. den. 439 U.S. 1051 [58 L.Ed.2d 712, 99 S.Ct. 733].)

Although that general proposition reflects a correct statement of law, we are not persuaded that existing state law pertaining to the exercise of due-on-sale clauses in any way infringes upon or is otherwise incompatible with the regulation or operation of the internal affairs of federal saving and loan associations. (See *Holiday Acres v. Midwest Fed. Sav. & Loan Ass'n* (April 3, 1981, No. 338) ..... Minn. ..... [..... N.W.2d .....].) The federal regulation merely authorizes and does not compel savings and loan associations to include a due-on-sale clause in their loan contracts and to exercise their rights thereunder. (*Id.*, at pp. .....)* As noted, California law imposes a more stringent requirement enforcing a due-on-sale clause only upon a showing that the lender's security will be either impaired or subjected to risk of default as a consequence of the transfer. But the federal loan association is not faced with physical impossibility in complying with the two regulatory schemes. Instead, the federal regulation leaves the rights and remedies of the parties intact under the terms of the loan contract. Thus, enforcement of the due-on-sale clause rests upon conventional contract and property principles under state law. (*Id.*, at p. .....)* There is no "inevitable collision" between the two regulations. (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at p. 143 [10 L.Ed.2d at p. 257].)

The Federal Home Loan Mortgage Corporation (FHLMC) appearing as amicus curiae, urges a finding of federal preemption based on a claim of need for national uniformity of loan practices and instruments.† In response,

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*Typed opinion pages 14-15.

*Typed opinion page 10.

†Briefly stated, the argument is made that due-on-sale clauses, by keeping the life of a mortgage relatively short, increase the lenders' yield and thereby promote the national interest by keeping overall interest rates down. Further, by providing a higher yield and a rapid return of capital to the lenders, due-on-sale clauses render the

we rely upon the persuasive language of the Minnesota Supreme Court: "If this national interest were indeed an important policy, it seems that the inclusion of such clauses would be mandated rather than permitted." (*Holiday Acres v. Midwest Fed. Sav. & Loan Ass'n, supra,* ..... N.W.2d at p. .....)† Nor, we think, would application of state law to the exercise of due-on-sale clauses interfere with the federal objectives embodied in the Home Owners' Loan Act. That legislation was enacted during a period of severe economic depression in order to assist financially distressed homeowners. It would be "unreasonable, and ironic, to hold now that the Congress intended [the act] to justify the removal of homeowners' protections under state law." (*Id.,* at p. .....)‡

Our conclusion finds further support in the particular provisions of the deed of trust employed herein. The form of instrument is apparently one promulgated by the FHLMC itself; its use is a precondition to purchase of the mortgage by FHLMC. The trust instrument contains so-called "uniform" and "nonuniform" covenants. The uniform covenants are intended for nationwide use while the nonuniform covenants are tailored to particular state mortgage requirements.[8] For example, the "nonuniform" cov-

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loans marketable in the secondary mortgage market, thereby attracting new funds to the mortgage market and, in turn, again keeping interest rates down. FHLMC, as purchaser of conventional mortgages, will purchase only those mortgages using the standardized FHLMC/FNMA loan instrument employed here.

†Typed opinion page 15.

‡Typed opinion page 17.

[8]Paragraph 15 of the deed of trust provides: "This form deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this

enants employed herein include California statutory requirements regarding notice (Civ. Code, § 2924(b)), reinstatement (Civ. Code, § 2924(c)) and the furnishing of a statement of obligation (Civ. Code, § 2943).

Included in the "uniform" covenants found in paragraph 15 is the express proviso that: *"This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located.* In the event that any provision or clause of this Deed of Trust or Note conflicts with applicable law, such conflict shall not affect other provisions. . . ." (Italics added.) We believe such language expresses an unmistakable intention that state law shall govern the interpretation, validity and enforcement of the loan-security instrument.

Waiver

Notwithstanding the relevant federal regulation, federal savings and loan associations are authorized to waive their rights under the due-on-sale clause.[9] Thus, it has been held that where a federal agency contracts with a private individual and the contract provides that state law governs the contract, state law will apply even in the face of general federal preemption. (*United States v. Stewart* (9th Cir.

Deed of Trust or Note conflicts with applicable law, such conflict shall not affect other provisions. . . ."

[9]Under the Board's statement of policy, savings and loan associations are empowered to waive their rights under the due-on-sale clause: "The Board believes there may be (in addition to the circumstance prescribed in § 545.8-3(g) in which exercise of a due-on-sale clause is prohibited) situations in which it will be appropriate for a Federal association to waive its contractural right to accelerate a loan. Those situations include transfer of title to members of the borrower's immediate family, including a former spouse in connection with a divorce, who occupy or will occupy the property (to the extent not covered by § 545.8-3(g)). Associations also should consider waiving, in cases of extreme hardship to the existing borrower, any right to require an increase in interest rate under a due-on-sale clause." (12 C.F.R. § 556.9(c).)

1975) 523 F.2d 1070 [California's antideficiency judgment statute controls where trust deed provided for interpretation under California law]; see *United States v. Yazell* (1966) 382 U.S. 341, 353 [15 L.Ed.2d 404, 410-411, 86 S.Ct. 500].) Since the subject deed of trust contains a similar provision invoking the "law of the jurisdiction in which the property is situated" in construing that instrument, we conclude that Pan American Federal Savings and Loan Association has effectively waived any claim of federal preemption.

In conclusion, we hold that California law is not preempted by virtue of the relevant federal regulation. Therefore, we reverse the judgment and remand for further proceedings consistent with the views expressed herein.

Elkington, J., and Grodin, J., concurred.

[Civ. No. 47918. First Dist., Div. One. June 29, 1981.]

Stanley E. Panko et al., Plaintiffs and Appellants, v. Pan American Federal Savings and Loan Association et al., Defendants and Respondents.

[Modification* of opinion (119 Cal.App.3d 916; — Cal. Rptr. —) on denial of petition for rehearing.]

THE COURT.—It is ordered that the opinion filed herein on June 1, 1981, be modified in the following particulars:

1. At the end of the last paragraph on page 2 [119 Cal. App.3d 916, 919, advance report, 2d full par., line 9], add as footnote 2, the following: "[2]We are advised that during the pendency of this appeal, Pan American has converted to a state-chartered savings and loan association. Since at the time of the events below Pan American was federally chartered, the central issue is not subject to a claim of mootness."

The addition of this footnote will cause all subsequent footnotes to be renumbered sequentially.

2. On page 2, line 2 of footnote 1[119 Cal.App.3d 916, 919, advance report, fn. 1, line 3], after "1977" add the following: ", as a loan condition imposed by Pan American." Delete the last sentence of footnote 1 on page 2 [119 Cal.App.3d 916, 919, advance report, fn. 1, lines 4-6], beginning "Thus," and ending with "the property."

3. On page 7, at the beginning of line 1, [119 Cal.App. 3d 916, 922, advance report, line 2], after "230" add "; see *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94 [160 Cal.Rptr. 733, 603 P.2d 1329].)"

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*This modification requires movement of text affecting pages 919-920 and 922-926 of the bound volume report.

4. On page 7, line 3 of footnote 5 [119 Cal.App.3d 916, 922, advance report, fn. 5, line 3], delete the comma and the word "but" and add "; however, associations which were formerly state-chartered banks" are not exempt.

5. On page 9, the last complete sentence, [119 Cal.App. 3d 916, 923, advance report, 2d full par., line 6], add as footnote 8, the following: "[8]Although the Minnesota Supreme Court declined to extend a state statute governing residential property to commercial property, we find that court's holding on the separate question of preemption to be no less persuasive."

The addition of this footnote will change former footnote 7 on page 10 [119 Cal.App.3d 916, 924, advance report] to footnote 9.

Respondents' petition for rehearing is denied.

Appendix B

In the Superior Court of the State of California
In and for the County of San Mateo

No. 227 987

Stanley E. Panko and
George L. Sinclair,
Plaintiffs,

vs.

Pan American Federal
Savings and Loan Association,
Pan American Service Corporation, et al,
Defendants.

[Filed Mar. 26, 1979]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants' motion for summary judgment and plaintiffs' motion for preliminary injunction was set for hearing by the stipulation of the parties hereto before the above-entitled Court on March 14, 1979. Plaintiffs appeared by their attorney, Donald M. Ahlbach. Defendants appeared by their attorney W. M. Pinney, Jr. The Court having examined the declarations submitted by all parties and having heard argument, the Court hereby finds as follows:

1. Pan American Federal Savings and Loan Association at all pertinent times herein, was and is a federal savings and loan association chartered under the laws of the United States of America.

2. As far as the due-on-sale clause contained in the note and deed of trust which is the subject matter of this litigation, this is a matter which has been preempted by federal law and California law is inapplicable thereto.

3. Defendants have done all acts required under the provisions of the note and deed of trust to perfect their rights to exercise the due-on-sale clause.

4. Plaintiffs have not produced in evidence any facts which would entitle them to the injunctive relief prayed for in their complaint, nor to present a triable issue of fact.

It Is Therefore Ordered that defendants' motion for a summary judgment is hereby granted and that plaintiffs' complaint is hereby dismissed.

Dated: March 23, 1979

/s/ THOMAS M. JENKINS
Thomas M. Jenkins
Judge of the Superior Court

Appendix C

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 1, Civil No. 47918

In the Supreme Court of the State of California

In Bank

Panko et al.

v.

Pan American Federal Savings and Loan Association et al.

[Filed Aug. 19, 1981]

Mosk, J., did not participate.

Respondents' petition for hearing Denied.

Richardson, J., is of the opinion that the petition should be granted.

/s/ BIRD
Chief Justice

Appendix D

Court of Appeal
State of California

First Appellate District, Division One

1 Civil 47918

Stanley E. Panko and
George L. Sinclair,
Plaintiffs/Appellants,

v.

Pan American Federal Savings and
Loan Association, a corporation,
and Pan American Service Corporation, a corporation,
Defendants/Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed November 4, 1981]

Notice is hereby given that Defendants and Respondents Pan American Savings and Loan Association (formerly Pan American Federal Savings and Loan Association) and Pan American Service Corporation hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeal, First Appellate District, Division One, reversing the judgment in the above-entitled cause, entered herein on June 1, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: November 2, 1981,
San Francisco, California

/s/ ROBERT A. SELIGSON
Robert A. Seligson
Counsel for Pan American Savings and Loan Association (formerly Pan American Federal Savings and Loan Association) and Pan American Service Corporation

Appendix E

U.S. Constitution Art. VI cl. 2

ARTICLE VI.

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 1464(a)

§ 1464. Thrift Institutions

Organizations authorized;
Federal mutual savings bank activities

(a)(1) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", or "Federal mutual savings banks" (but only in the case of institutions which, prior to conversion, were State mutual savings banks located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. An association which was formerly organized as a savings bank under State law may not convert from the mutual to the stock form of ownership. An

association which was formerly organized as a savings bank under State law may not convert from the mutual to the stock form of ownership. An association which was formally organized as a savings bank under State law may, to the extent authorized by the Board, continue to carry on any activities it was engaged in on December 31, 1977, and to retain or make any investments of a type it held on that date, except that its equity, corporate bond, and consumer loan investments may not exceed the average ratio of such investments to total assets for the five-year period immediately preceding the filing of an application for conversion and such an association which was formerly organized as a savings bank under State law shall only be permitted to establish branch offices and other facilities in accordance with the limitations imposed by State law controlling applications of a savings bank organized under such State law, provided that such an association: (A) shall be exempt from any numerical limitations of State law on the establishment of branch offices and other facilities, and (B) may, in any case, subject to the approval of the Board, establish branch offices and other facilities in its own Standard Metropolitan Statistical Area, its own county or within thirty-five miles of its home office, but only in its State of domicile. An association which was formerly organized as a savings bank under State law shall be subject to the requirements of State law (including any regulations promulgated thereunder and any sanction for the violation of any such law or regulation) in effect at the time of conversion, in the State of its original charter —

(A) pertaining to discrimination in the extension of home mortgage loans or adjustment in the terms of mortgage instruments based on neighborhood or geographical area,

(B) pertaining to requirements imposed under the Consumer Credit Protection Act,

if the Board determines that State law and regulations impose more stringent requirements than Federal law and regulations.

(2) A Federal mutual savings bank may make commercial, corporate, and business loans except that —

(A) not more than 5 per centum of the assets of such a bank may be so loaned; and

(B) such loans may only be made within the State where the bank is located or within 75 miles of the bank's home office.

(3) In addition to the authority conferred by paragraph (1), a Federal mutual savings bank may accept demand deposits in connection with a commercial, corporate, or business loan relationship.

Federal Home Loan Bank Board Regulations

12 C.F.R. § 545.8-3 (f) and (g)

(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and (3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

12 C.F.R. § 556.9 (d) and (f)

§ 556.9 Imposition of late charges and due-on-sale clauses.

(d) Even though a Federal association may increase the interest rate as a condition of loan assumption, the Board expects that no association will request such an increase to a rate exceeding the then prevailing rate on comparable

new loans made by the association applying its normal lending standards.

• • •

(f) *Due-on-sale policy and Federal preemption.* (1) Federal associations are obliged to take reasonable precautions to protect themselves against the economic risks associated with mortgage lending, including the risk that the cost of lendable funds will exceed the yield from existing mortgage loans, and that sharply rising interest rates will reduce substantially the value of existing mortgage assets. In this connection, the Board has determined that the due-on-sale clause normally is a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments. Consequently, the Board for many years has authorized due-on-sale clauses for use by Federal associations. However, because the Board desires to afford associations the flexibility to accommodate special situations and circumstances, § 545.8-3(f) of this Subchapter by its terms merely authorizes rather than compels the inclusion and exercise of due-on-sale clauses in mortgage loans.

(2) Paragraph (f) of § 545.8-3 confirms the continuing authority of Federal associations to include due-on-sale clauses in their mortgage loan contracts and to exercise such clauses, subject only to the express limitations contained in § 545.8-3(g). Due-on-sale practices of Federal associations shall be governed exclusively by the Board's regulations, in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise (including, but not confined to, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers).

Federal Home Loan Bank Board

Resolution No. 76-100

Federal Home Loan Bank Board

[12 CFR Part 545]

[No. 76-100]

Federal Savings and Loan System

Late Charges and Due on Sale Clauses

February 6, 1976.

The following summary of the amendment proposed by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the proposed amendment.

I. *Present situation.* The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts, to assess, impose, and collect late charges respecting deliquent periodic installment payments on such loans, and to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the loan without the consent of the association.

II. *Proposed Regulation.* A. Would continue to empower a Federal association to include, as a matter of contract between it and the borrower, provisions in its loan contracts for assessment, imposition, and collection of a late charge respecting any deliquent periodic installment payment on the loans, and for the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without the prior written consent of the association.

B. Would place specified limits on the maximum amount of late charges which could be collected by a Federal association on future contracts as to loans on the security of a home (1-4 family) occupied or to be occupied by the borrower.

C. Would restrict the circumstances under which a Federal association could exercise its acceleration option (due on sale clause) on future contracts as to loans on the security of a home (1-4 family) occupied or to be occupied by the borrower.

III. *Reasons for Proposed Change.* A. To clarify the existing authority of Federal associations to assess, impose, and collect late charges, and to set limits on late charges which can be collected by Federal associations on future loans on the security of a home occupied or to be occupied by the borrower.

B. To clarify the existing authority of Federal associations to exercise due on sale clauses, and limit the circumstances under which such clauses can be exercised on future loans on the security of a home occupied or to be occupied by the borrower.

• • •

Due-on-Sale

It is the position of the Board that "due on sale" clauses are authorized for Federal associations under § 545.6-11, the Board regulation governing the terms of the loan documents used by Federal associations.

While there are may variants of the "due on sale" clause in common use in security transactions in real property, they typically provide for the acceleration of the maturity of the loan—at the option of the lender—upon the sale or transfer by the borrower of all or any part of the real

property securing the loan, unless the lender has given its prior consent to such sale or transfer.

There are three commonly assigned reasons underlying the exercise of "due on sale" clauses. Such clauses enable the lending savings and loan association to—

(1) Ensure that the real property securing its loan is not sold, subject to its loan, to a person of doubtful financial stability, and to assure that its loan is not assumed by a new purchaer whom the association does not consider to be creditworthy;

(2) Adjust its loan portfolio towards current market rates, thus safeguarding and protecting the financial stability of the association and permitting it to make new home loans at lower interest rates than otherwise would be necessary to maintain an adequate yield on its mortgage portfolio; and

(3) Sell its existing home loans in the secondary mortgage market in an orderly manner, thereby generating substantial new funds for additional residential loans, which otherwise would be unavailable.

The Board believes that a contractual ability to repay the loan and property exercisable by a Federal association for any of the foregoing reasons. (sic) The Board is of the view that the financial security and stability of Federal associations would be endangered if the loan is, as a practical matter, assumed by a new borrower without credit underwriting by the association in connection with the sale of the security property. If the security property is transferred to a person whose ability to repay the loan and properly maintain the property is inadequate, the Board believes that the lending association's ability to protect its vital security interest is endangered. The Board also is of the view that elimination of the due on sale clause will

cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally. The Board is concerned that such higher rates and/or charges could adversely affect home buyers generally, and particularly younger families who are purchasing their first home—the group which ordinarily can least afford the additional expenses. The Board further is of the view that elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans, which otherwise would be available. Any such reduction would adversely affect home buyers, the housing industry and the national economy. Lastly, the Board is of the view that elimination of the due on sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers.

The Board notes that the majority of courts which have considered the matter have upheld the validity of due on sale clauses used by savings and loan associations. However, recently the authority of Federal associations to exercise their contractual due on sale clauses has been the subject of controversy and litigation in certain States. Therefore, the Board deems it desirable to amend § 545.6-11 to clarify the existing authority of Federal associations to include due on sale clauses in their loan contracts with borrowers and to exercise such clauses. The Board also deems it desirable to include in such amendment limitations on the exercise by Federal associations of their existing due on sale authority as to certain future loans.

Paragraph (f) of the proposed amendment would provide that a Federal association continues to have the power to include, solely as a matter of contract between it and its borrowers, provisions in its loan contracts and/or loan instruments whereby the association may, at its option, declare the entire amount of the loan is immediately due and payable if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Paragraph (f) would provide further that, except as provided in paragraph (g) with respect to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrower, the exercise by a Federal association of any option to accelerate the maturity of its existing or future loans in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association shall be exclusively governed by the terms of the loan contract between such association and the borrower, and that all rights and remedies of the association and borrower respecting such acceleration shall be fixed and governed by said loan contract. The provisions of paragraph (f) would apply to any sale or transfer of the loan security property by the borrower, except for the specific transactions delineated in paragraph (g), including any sale or transfer through an installment land contract or similar means of sale.

Paragraph (g) of the proposed amendment would provide three limitations on a Federal association's contractual right to exercise due on sale clauses as to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrowers. First, a Federal association's contractual option to accelerate the maturity of the loan in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association would not apply

to, and would exclude, the following transactions respecting the loan security property: (i) the creation of a lien or encumbrance subordinate to the association's mortgage or deed of trust; (ii) the creation of a purchase money security interest for household appliances; (iii) a transfer by devise, descent or by operation of law upon the death of a joint tenant; or (iv) the grant of any leasehold interest of three years or less not containing an option to purchase.

Second, a Federal association would waive any contractual option to accelerate if, prior to the sale or transfer of the loan security property, the association and the person to whom the property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its note, mortgage and/or deed of trust shall be at such rate as the association shall request. The Board anticipates that the association will request a rate consistent with the then prevailing rate charged by the association on loans of similar amount and maturity with respect to similar types of security property to borrowers of similar creditworthiness. Further, if the Federal association has waived its option to accelerate as provided in paragraph (g), and if the borrower's successor in interest has executed a written assumption agreement of the loan accepted in writing by the association, the association would release the borrower from all obligations under the note, mortgage and/or deed of trust securing the loan, and solely for the purpose of § 541.14(a) of the Federal Regulations the association would be deemed to have made a new loan to the borrower's successor in interest.

The foregoing limitations on the exercise of due on sale clauses closely parallel the provisions contained in the

standard loan documents used jointly by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. Thus, many Federal savings and loan associations throughout the Nation already are following such limitations on the exercise of due on sale clauses in connection with billions of dollars in residential home loans which they originated and sold—in whole or in part—to the Federal Home Loan Mortgage Corporation or to the Federal National Mortgage Association, and to the Government National Mortgage Association.

Third, a Federal association would be precluded from imposing a prepayment penalty, or equivalent charge, on the borrower upon the acceleration of the maturity of the loan, and the payment thereof by the borrower, due to the exercise by the association of its contractual due on sale clause.

Aside from the three limitations set forth above, Federal associations may elect, as they have done in the past in individual cases, to waive their contractual due on sale rights when, in their judgment, unusual hardships exist respecting particular borrowers.

Interested persons are invited to submit written data, views and arguments to the Office of the Secretary, Federal Home Loan Bank Board, 320 First Street, N.W., Washington, D.C. 20552, by March 22, 1976, as to whether this proposal should be adopted, rejected, or modified. Written material submitted will be available for public inspection at the above address.

The Federal Home Loan Bank Board considers it desirable to amend Part 545 of the rules and regulations for the Federal Savings and Loan System (12 CFR Part 545), for the purposes described below. Accordingly, the Board hereby proposes to amend said Part 545 by adding new

paragraphs (d), (e), (f) and (g) to § 545.6-11, to read as set forth below.

§ 545.6-11 Loan contract.

* * *

(f) *Due on sale clauses.* A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan contract and/or loan instruments whereby the Federal association may, at its option, declare the entire amount of the loan immediately due and payable if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after May 31, 1976, on the security of a home occupied or to be occupied by the borrower, the exercise by a Federal association of any option to accelerate the maturity of existing or future loans in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association shall be governed exclusively by the terms of the loan contract between the association and the borrower, and all rights and remedies of the association and borrower respecting such acceleration shall be fixed and governed by said loan contract.

(g) *Limitations on the exercise of due on sale clauses.* (1) With respect to any loan made after May 31, 1976, on the security of a home (as defined by § 541.10-2) occupied or to be occupied by the borrower, a Federal association's contractual option to accelerate the maturity of the loan in the event of a sale or transfer by the borrower of all or any part of the loan security property without the prior written consent of the association shall not apply to, and shall exclude, the following transactions respecting the loan security property:

(i) The creation of a lien or encumbrance subordinate to the association's mortgage or deed of trust;

(ii) The creation of a purchase money security interest for household appliances;

(iii) a transfer by devise, descent or by operation of law upon the death of a joint tenant; or

(iv) The grant of any leasehold interest of three years or less not containing an option to purchase.

(2) Further, with respect to any aforesaid loan made after May 31, 1976, no Federal association shall impose a prepayment penalty, or equivalent charge, on the borrower upon the acceleration of the maturity of the loan, and the payment thereof by the borrower, due to the exercise by the association of its contractual option to accelerate as a result of the sale or transfer by such borrower of all or any part of the loan security property without the written consent of the association. With respect to loans governed by this paragraph, a Federal association shall have waived any contractual option to accelerate if, prior to the sale or transfer of the loan security property, the association and the person to whom the property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its note, mortgage and/or deed of trust shall be at such rate as the association shall request. If the Federal association has waived its option to accelerate as provided in this paragraph, and if the borrower's successor in interest has executed a written assumption agreement of the loan accepted in writing by the association, the association shall release the borrower from all obligations under the note,

mortgage and/or deed of trust securing the loan, and solely for the purpose of § 541.14(a) the association shall be deemed to have made a new loan to the borrower's successor in interest.

(Sec. 5, 48 Stat. 132, as amended; 12 U.S.C. § 1464. Reorg. Plan No. 3 of 1947, 12 FR 4981, 3 CFR, 1943-48 Comp., p. 1071).

By the Federal Home Loan Bank Board.

[Seal]

J. J. FINN,
Secretary.

Federal Home Loan Bank Board
Resolution No. 76-296

Date: April 28, 1976

TITLE 12—BANKS AND BANKING
Chapter V—Federal Home Loan Bank Board
Subchapter C—Federal Savings and Loan System
Part 545—Operations
Part 556—Statements of Policy
AMENDMENTS RELATING TO LATE CHARGES AND DUE-ON-SALE CLAUSES

Summary

The following summary of the amendments adopted by this Resolution is provided for the reader's convenience and is subject to the full explanation in the following preamble and to the specific provisions of the amendments.

I. Present Situation

The Federal Home Loan Bank Board permits Federal associations, if authorized by their loan contracts . . . to declare the loan immediately due and payable if the borrower sells or transfers the real property securing the loan without the consent of the association.

II. Final Amendment

A. A Federal association continues to be empowered to include, as a matter of contract between it and the borrower, provisions in its loan contracts for . . . the acceleration of the maturity of the loan, at the option of the association, if the borrower sells or transfers the loan security property without prior written consent of the association.

• • •

C. Restrictions are placed on exercise of acceleration (due-on-sale) clauses contained in future loan contracts secured by borrower-occupied homes.

III. Differences from Proposal

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B. Due-on-sale Clauses

A new Statement of Policy is issued regarding exercise of due-on-sale clauses and loan assumptions.

C. *Effective Date*

Effective date is 7/31/76; proposal specified 5/31/76

By Resolution No. 76-100 of February 6, 1976, the Federal Home Loan Bank Board proposed to amend § 545.6-11 of the Rules and Regulations for the Federal Savings and Loan System (12 CFR 545.6-11) for the purposes of clarifying and limiting the authority of Federal savings and loan associations in the area of late charges and due-on-sale clauses. Notice of such proposed rulemaking was duly published in the *Federal Register* on February 12, 1976 (41 F.R. 6283-6287), with an invitation for interested persons to submit comments by March 22, 1976. On the basis of all relevant material presented by interested persons and otherwise available, the Board hereby adopts the changes as proposed, with modifications discussed below.

• • •

Paragraphs (f) and (g) of § 545.6-11, relating to Federal associations' authority regarding due-on-sale clauses, are adopted substantially as proposed, with some portions re-written or re-numbered for clarification purposes only. The effective date of the limitations is July 31, 1976.

A new Statement of Policy clarifying and interpreting the Board's policies pertaining to late charges and due-on-sale clauses is adopted by the Board at § 556.9. Paragraph (a) expresses the Board's view that all contract terms affecting the borrower should be fully disclosed no later

than the time of loan closing. Paragraph (b)(1) states that the Board disfavors the practice of imposing prepayment charges upon exercise of due-on-sale-clauses with regard to loans made prior to August 1, 1976, on the security of borrower-occupied homes, and urges associations to curtail this practice in connection with such earlier loans in the absence of extraordinary circumstances. Paragraph (b)(2) describes considerations relevant to imposition of late charges with regard to loans made prior to August 1, 1976. Paragraph (c) expresses the Board's view that there may be circumstances other than those described in § 545.6-11(g)(1) where an association should consider waiver of its acceleration option. Paragraph (d) states the Board's expectation that, in transactions covered by the loan assumption provision of § 545.6-11(g)(3), associations should not increase interest rates to rates in excess of current-market interest rates for comparable loans made by the associations applying their normal underwriting standards. New paragraph (e) states the Board's interpretation with respect to maintenance of mortgage insurance in connection with the requirements of paragraph 545.6-11(g)(3).

Finally, it was and is the Board's intent to have late charges and due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, charging of late charges and exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by § 545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different late charges or due-on-sale requirements, nor shall Federal associations attempt to impose a higher late charge than permitted in § 545.6-11(e) or avoid the limitations on the exercise of due-on-sale clauses delineated in § 545.6-11(g) on the

ground that such higher charge or avoidance of limitations is permissible under State law.

Accordingly, the Board hereby revises § 545.6-11 and adds § 556.9 to read as set forth below, effective June 8, 1976.

1. Part 545—Operations

§ 545.6-11 *Loan contract.*

• • •

(f) *Due-on-sale clauses.* A Federal association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instruments whereby the association may, at its option, declare immediately due and payable all of the sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by an association of such an acceleration option (hereafter called a due-on-sale clause) shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and borrower thereto shall be fixed and governed by said contract.

(g) *Limitations on the Exercise of due-on-sale clauses.*

(1) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association may not exercise a due-on-sale clause based on any of the following:

(i) creation of a lien or other encumbrance subordinate to the association's security instrument;

(ii) creation of a purchase money security interest for household appliances;

(iii) transfer by devise, descent, or by operation of law upon the death of a joint tenant; or

(iv) grant of any leasehold interest of three years or less not containing an option to purchase.

(2) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, no Federal association shall impose a prepayment charge or equivalent fee in connection with the acceleration of the loan pursuant to the exercise of a due-on-sale clause.

(3) With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association shall have waived its option to exercise a due-on-sale clause as to a specific transfer if, prior to that transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) reach written agreement that the credit of such person is satisfactory to the association and that the interest payable to the association on sums secured by its security instrument shall be at such rate as the association shall request. Upon such written agreement and resultant waiver, the association shall release such existing borrower from all obligations under the loan instruments, and for purposes of § 541.14(a) the association shall be deemed to have made a new loan to such existing borrower's successor in interest.

2. Part 556 — Statements of Policy

§ 556.9 *Imposition of late charges and due-on-sale clauses.*

(a) The Board allows Federal savings and loan associations certain authority to incorporate into loan instruments

provisions for imposition of late charges, prepayment charges, and exercise of acceleration clauses, including due-on-sale clauses. The Board expects associations to adopt procedures sufficient to ensure that, no later than the time of loan closing, the rights and obligations of the contracting parties under these provisions are fully and specifically disclosed to borrowers.

(b)(1) Imposition of a prepayment charge upon exercise of a due-on-sale clause is prohibited pursuant to § 545.6-11(g)(2) of this subchapter only with regard to loans made upon borrower-occupied homes after July 31, 1976; however, the Board looks with disfavor upon such practice respecting all loans made on the security of borrower-occupied homes, and believes that associations should abstain therefrom in connection with such loans made before such date, except in extraordinary circumstances.

• • •

(c) Paragraph 545.6-11(g)(1) of this subchapter prohibits with respect to borrower-occupied-home loans made after July 31, 1976, exercise of due-on-sale clauses to accelerate the loan based on creation of junior liens, certain purchase-money security interests, transfers by devise, descent, or by operation of law upon the death of a joint tenant, and certain short-term leasehold interests. However, the Board believes that there may be other situations respecting loans made on the security of borrower-occupied homes in which, depending on the circumstances of the individual case, it will be appropriate for Federal associations to waive their contractual right to accelerate. These situations include transfers of title to members of the borrower's immediate family, including a former spouse in connection with a divorce, who occupy or will occupy the property (to the extent not covered by paragraph 545.6-11(g)(1)(iii)). In addition, associations should consider

waiving any right to require an increase in interest rate pursuant to a due-on-sale clause in cases of extreme hardship to the existing borrower.

(d) Paragraph 545.6-11(g)(3) of this subchapter authorizes Federal associations to increase the interest rate as a condition of loan assumption. However, the Board expects that no association will request an increase in the interest rate to a rate in excess of the then prevailing rate on comparable new loans made by the association applying its normal underwriting standards.

(e) The Board does not interpret paragraph 545.6-11(g)(3) of this subchapter to preclude an association from requiring, as a condition to an assumption, the continued maintenance of mortgage insurance by the existing borrower's successor in interest, whether by endorsement of a policy previously procured by the existing borrower or by entrance into a new contract of insurance.

(Sec. 5, 48 Stat. 132, as amended; 12 U.S.C. § 1464. Reorg. Plan No. 3 of 1947, 12 F.R. 4981, 3 CFR, 1943-46 Comp., p. 1071)

By the Federal Home Loan Bank Board

/s/ J. J. FINN
J. J. Finn
Secretary

California Civil Code § 711.

§ 711. Conditions in restraint of alienation

CONDITIONS RESTRAINING ALIENATION VOID. Conditions restraining alienation, when repugnant to the interest created, are void. (Enacted 1872.)

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-922

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (Formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,
Appellants,

vs.

STANLEY E. PANKO and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal First Appellate District

MOTION OF APPELLEES STANLEY E. PANKO and GEORGE L. SINCLAIR TO DISMISS OR AFFIRM

JOHN R. HETLAND
COUNSEL OF RECORD
CHARLES A. HANSEN
JOHN R. HETLAND
A Professional Corporation
2600 Warring Street
Berkeley, CA 94704
(415) 548-5900

DONALD M. AHLBACH
1486 Huntington Avenue
Suite 200
South San Francisco
CA 94080
(415) 952-1550
Attorneys for Appellees

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Should an appeal from a state court on a claim of federal preemption be dismissed where no final judgment has been entered and where there exists a significant possibility that, upon remand, federal law and state law will be reconciled insofar as applicable to the facts of the case, and judgment ultimately rendered in Appellants' favor?

2. Have Appellants met their burden of establishing this Court's jurisdiction where the state court judgment rests on the adequate and independent state ground that a printed clause in an adhesive deed of trust adopting the "law of the jurisdiction" constitutes a waiver by the lender of any possible claim of federal preemption?

3. Should the decision below be affirmed as correctly concluding that existing federal law has not preempted state laws, uniformly applied to state and federally-chartered savings and loan associations, restricting the enforcement of "due-on-sale" clauses to circumstances where such enforcement does not constitute an unreasonable restraint on alienation as proscribed by state law?

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No. 81-922

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION
(Formerly Pan American Federal Savings and Loan Association) and Pan American Service Company,
Appellants,

vs.

STANLEY E. PANKO and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal
First Appellate District

MOTION OF APPELLEES STANLEY E. PANKO and GEORGE L. SINCLAIR TO DISMISS OR AFFIRM

Appellees Stanley E. Panko and George L. Sinclair hereby respectfully move to dismiss this appeal or affirm the judgment of the California Court of Appeal. Rule 16(1) (a), (b) and (d).

STATEMENT OF CASE

California sanctions the inclusion and enforcement of "due-on-sale" clauses in real property mortgages in order to fully protect the mortgagee against any risk to or impairment of security attendant upon transfer of the encumbered property to a third party grantee. *Wellenkamp v. Bank of America*, 21 C.3d 943 (1978); *Tucker v. Lassen Sav. & Loan Ass'n.*, 15 C.3d 629 (1974). However, California courts have held that unreasonable restraints on alienation, violating California Civil Code § 711, are created where a due-on-sale clause is invoked *automatically*, that is, where it is used as a pretext for the acceleration of a mortgage loan for reasons totally unrelated to the sale. *Id.* California's prohibition against purely automatic due-on-sale acceleration is uniformly applied to all institutional lenders doing business within the state.[1] *Wellenkamp, supra;* cf. *Tucker v. Lassen Sav. & Loan Ass'n., supra; LaSala v. American Sav. & Loan Ass'n.*, 5 C.3d 864 (1971); Hetland, *After Wellenkamp*, California Real Estate Magazine, Dec. 1978, Vol. 58, No. 12; Jan. 1979, Vol. 59, No. 1; Feb. 1979, Vol. 59, No. 2.

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[1]The issue of whether this prohibition applies to non-institutional lenders is currently pending before the California Supreme Court in *Dawn Investment Co. Inc., et al. v. Superior Court*, No. LA 31413 (Nov. 5, 1981). Also at issue in *Dawn* is whether the *Wellenkamp* rule applies to mortgages secured by commercial or investment property. The "commercial property" issue was presented in the proceedings below in the instant case and was decided by the Court of Appeal in favor of applying the *Wellenkamp* rule to commercial property. However, denial of the Petition for Hearing in the instant case does not constitute authority that the California Supreme Court concurs with this result. *Cole v. Rush*, 45 C.2d 345 (1955).

The present dispute arises out of an attempt by Pan American Savings and Loan Association (hereafter Pan American) to *automatically* enforce a due-on-sale clause contained in a deed of trust secured by commercial property.

The deed of trust was originally executed in November, 1977, between Joseph and Sandra Karp, as mortgagors, and Pan American, as mortgagee. The 1977 mortgage was a "hard money" mortgage resulting from the Karp's refinancing of the encumbered property. Pan American utilized a printed deed of trust form for the transaction. The form in question is a "uniform" deed of trust prepared by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association and widely used by both state and federally-chartered lenders. The deed of trust form contains two printed clauses relevant to the present dispute: a "due-on-sale" clause and a "choice of law" clause. The language of these clauses is accurately described in Appellants' Jurisdictional Statement.

The Karps sold the encumbered property to Stanley Panko and George L. Sinclair in June, 1978, "subject to" the existing deed of trust benefiting Pan American.[2] Pan American thereafter invoked the due-on-sale clause and demanded immediate payment in full. On August 8, 1978,

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[2]By taking "subject to", Panko and Sinclair undertook an obligation to make timely mortgage payments to Pan American. See, generally Maxwell, Riesenfeld, Hetland and Warren, *California Cases on Security Transactions in Land*, West 2d Ed. Chap. 8, p. 424, et seq. (1975). The Karps remained primarily liable to Pan American. *Id.* Since the mortgage was not a "purchase money" mortgage, the Karps remained and still remain subject to a potential deficiency judgment in favor of Pan American in the event of default by Panko and Sinclair. See, C.C.P. § 5806; *Banta v. Rosaco*, 12 C.A.2d 420 (1936); Hetland, *California Real Estate Secured Transactions*, § 6.28, pp. 278-280 (CEB 1970).

Pan American commenced non-judicial foreclosure proceedings pursuant to California Civil Code § 2924.[3]

On November 21, 1978, Panko and Sinclair filed an action for declaratory relief and to enjoin trustee's sale. Before pre-trial discovery had been conducted and before filing responsive pleadings, Pan American moved the trial court for Summary Judgement, claiming that federal law preempts California's restrictions on due-on-sale acceleration.

The trial court granted Pan American's Motion for Summary Judgment. After the motion was orally granted, but before any proceedings were commenced in the Court of Appeal, Pan American voluntarily converted from federally-chartered to state-chartered status.

Panko and Sinclair appealed, and the Court of Appeal held that California law prohibits the automatic acceleration of the mortgage in question on the basis of the sale to Panko and Sinclair. (A copy of the Opinion appears in the Appendix.) As an independent and additional ground for its conclusion, the Court of Appeal held that the "choice of law" clause within the deed of trust, as interpreted under state law, constitutes a waiver by Pan American of any claim to exemption from California law by virtue of federal preemption. The Court of Appeal remanded to the trial court for further proceedings.

The California Supreme Court denied Pan American's Petition for Hearing and the present appeal ensued.

SUMMARY OF ARGUMENT

Appellees Stanley E. Panko and George L. Sinclair move the Court to dismiss the instant appeal as improvidently taken in excess of this Court's jurisdiction in that there exists no final judgment below and no certainty as to the

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[3]Curiously, the Notice of Default cited an alleged failure by the Karps ". . . to pay interest and principal payments" although Panko and Sinclair had properly tendered the first monthly payment in satisfaction of the Karp's obligation

character of the judgment which will be entered and, further, in that the decision below is supported by an adequate and independent state ground. In the alternative, Appellees move the Court to affirm the decision below as correctly rejecting the claim that federal law, as presently constituted, preempts the application of California's statutory prohibition of unreasonable restraints on alienation to federally-chartered savings and loan associations operating within California.

MOTION TO DISMISS

A

NO JURISDICTION EXISTS UNDER 28 U.S.C. § 1257(2) SINCE THERE HAS BEEN NO FINAL JUDGMENT IN THE CALIFORNIA COURTS, AND THE CALIFORNIA DECISION RESTS ON ADEQUATE NON-FEDERAL GROUNDS.

This appeal is improperly taken under 28 U.S.C. § 1257(2) because there has been no final judgment by the California courts.[4] The California Court of Appeal has merely reversed the granting of summary judgment and remanded, enabling pre-trial discovery and, if necessary, trial, to occur. Given this posture, nothing has been conclusively determined or decided. Furthermore, the California court's decision rests on an adequate non-federal ground, based, as it is, on interpretation of contractual provisions under California law resulting in a finding of a waiver by Appellant of any federal preemption claim.

1. There Is No Final Judgment in the Instant Proceeding, and No Certainty as to the Terms or Nature of Any Anticipated Judgment on Remand.

This appeal is taken despite the factual vacuum existing, and despite the fact that on remand to the state trial court

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[4]The jurisdictional authorities discussed in this section apply with equal force in the event that this Court were to treat the instant appeal as a Petition for Certiorari. 28 U.S.C. § 1257.

Pan American may well prevail on any of several grounds urged in its state court appeal. The appeal falls outside this Court's jurisdiction, therefore, since there has been a merely interlocutory and non-final determination of the state court litigation, and the case on remand requires substantial further judicial involvement and review in order to finally adjudicate the rights of the parties. *Market Street R. Co. v. Railroad Commission,* 324 U.S. 548, 551 (1945).

On remand to the state trial court, Pan American may prevail on a showing that it is entitled under state law to invoke the due-on-sale provision in the deed of trust. There are two possible bases on which it might obtain a favorable judgment. First, it may establish that, in fact, its security has been impaired by sale of the property to Panko and Sinclair, and thus fall squarely within the class of mortgagees protected by *Wellenkamp.*[5]

Second, as Pan American itself recognizes, it may prevail on the grounds that the property involved is commercial in nature. This argument was urged by Pan American in its state court appeal and, as previously indicated, the question whether *Wellenkamp* applies to commercial property is now pending before the California Supreme Court. (*Dawn Investment Co., Inc., et al. v. Superior Court, supra.*)

Pan American's appeal at this tentative stage in the state court proceedings would serve to frustrate the stated purposes of the finality requirement of § 1257. That code sec-

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[5]While Pan American conceded, for purposes of its appeal, that its security had not been impaired, such concession on appeal does not bar Pan American from later withdrawing it and raising that issue on re-trial, particularly where, as here, nothing exists in the record to sustain such a factual concession. *James v. LeDeit,* 228 C.A.2d 474 (1964). California follows the rule that concessions by a party in its brief on appeal need not be accepted as establishing the applicable law on a recurring problem of general importance. *Desby v. Wilder,* 46 C.2d 715, 729 (1956).

tion is critical to the functioning of our unique federal system, and serves to avoid piecemeal review of state court decisions, to avoid giving advisory opinions, and to limit to a minimum federal intrusion into state affairs. *North Dakota Pharmacy Board v. Snyder's Drug Stores,* 414 U.S. 156, 159 (1973).

The finality requirement takes on added importance where, as here, a federal claim is asserted against a state court's decision in a matter peculiarly of local concern. *Republic Gas Co. v. Oklahoma,* 334 U.S. 62, 72 (1948); *State Land Board v. Corvallis Land & Gravel,* 429 U.S. 363 (1977) (real property ownership is governed by state laws); *United States v. Fox,* 94 U.S. 315 (1877).

Pan American's appeal is not based upon any of the few recognized exceptions to the finality requirement as enumerated in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 479-485 (1975). Referring to this Court's summary of prior cases in *Cox,* none of the first three categories mentioned therein even remotely applies to Pan American's appeal. The outcome of this case on remand is, as shown, far from certain and could result in a judgment in favor of Pan American on grounds not subject even to a claim of state/federal conflict. Cf. *Mills v. Alabama,* 384 U.S. 214 (1966); *Brady v. Maryland,* 373 U.S. 83 (1963).

Even if Appellants were to lose at trial, no state court rule or law precludes an appeal, at that time, based on Pan American's alleged federal preemption claim. (Cf. *California v. Stewart,* 384 U.S. 436 (1966); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra.*)

Neither does Appellants' claim fall within "that small class" of state court judgments[6] in which the Court has recognized jurisdiction where to refuse immediate review might seriously erode federal policy. *Cox, supra,* at pp. 483-

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[6] *Local No. 438 Construction & General Laborers' Union v. Curry,* 371 U.S. 542 (1963).

484; e.g. *Construction Laborers v. Curry, supra; Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974).

Pan American's appeal, at best, is founded on a claim of implied preemption by regulatory fiat,[7] and its claims that the California restrictions on automatic invocation of a due-on-sale clause have national impact are totally lacking in support. In fact, Pan American's voluntary conversion to that of a state-chartered institution after instigating this suit belies any possible claim that the California rule adversely affects even its own financial stability.[8]

This showing by Pan American falls far short of establishing the jurisdiction of this Court in a case where, admittedly, there is no finality to the state court proceedings. (Cf. *Miami Herald v. Tornillo, supra,* where the critical issue involved was the protection of the right of the press to discuss governmental affairs during the impending 1974 national elections.)

The appeal is taken in excess of this Court's jurisdiction under 28 U.S.C. § 1257, and for that reason should be dismissed.

2. The State Court Decision Rests Adequately on Non-Federal Grounds Based, As It Is, on an Interpretation Under State Law of the Real Property Contract in Question.

The state court below expressly held that, notwithstanding the relevant federal regulations, Pan American has waived any claim of federal preemption. This finding is based upon an interpretation and construction under state law of the deed of trust contract, particularly the language selecting "the law of the jurisdiction in which the property is situated" as the governing law. (Appendix at A-11) On this basis the state court found that Pan American agreed that California law governs the deed of trust.

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[7]See Section B-3, *infra.*

[8]See Section A, *infra.*

Pan American argued below that the phrase "law of jurisdiction" is to be taken to mean "the law of California, totally preempted by federal law, and therefore only federal law." California statutory and decisional law supports the state court in its rejection of this interpretation.[9]

In its interpretation of the contractual terms, the Court of Appeal was correctly applying settled principles of contract construction to a concededly ambiguous phrase. Under California law, words in contracts must be given their plain and ordinary meaning. Cal. Civ. Code § 1644. Whenever possible, language in several clauses is to be taken together to avoid a contradiction in terms. Cal. Civ. Code § 1635. Any ambiguity in terms is to be construed against the party responsible for the existence of such terms Cal. Civ. Code § 1654.

These rules are uniformly applied in interpreting deed of trust instruments. *Fox v. Aced,* 49 C.2d 381 (1957); *Wood v. Mandrilla,* 176 C. 607 (1914); *Kunz v. Anglo Bank,* 214 C. 341 (1931); *Pickering Lumber Corp. v. Whiteside,* 54 C.A.2d 200, 210 (1942); *certiorari denied* 318 U.S. 763 (". . . any contract affecting title to the real property situated in California is to be construed according to the laws of California"). The Court of Appeal's result is unquestionably correct under state law.

That this interpretation of the contract represents an adequate state ground is reinforced by the well-recognized rule that in our federal system matters of contract and real property are peculiarly and uniquely of state concern. As recently reaffirmed by this Court, property ownership, including its acquisition, transfer, transmission, and the rights and duties of its owners, is defined in the statutes and decisions of the various states. *State Land Board v.*

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[9]That the California Court of Appeal correctly concluded, based on this interpretation, that Pan American has waived any federal preemption claim, is addressed in depth at Section C, *infra.*

Corvallis Sand & Gravel Co., supra, 429 U.S. at 378; *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 155 (1944); *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591 (1973).

Similarly, state law traditionally controls the interpretation and validity of contractual agreements. *Aronson v. Quick Point Pencil Co.,* 440 U.S. 257, 262 (1979); *United States v. Yazell,* 382 U.S. 341, 353 (1966).

Appellees submit that the express ruling by the state court, basing its decision in part on its interpretation of the contract, constitutes an adequate and independent state ground such that this Court should not take jurisdiction to review that decision. *Herb v. Pitcarin,* 324 U.S. 117 (1954); *Black v. Cutter Laboratories,* 351 U.S. 292 (1956); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934).

This appeal should be dismissed for lack of jurisdiction under 28 U.S.C. § 1257.

MOTION TO AFFIRM

A

THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THE FUNCTION AND CONDUCT OF THE FEDERAL ASSOCIATIONS AND PRESENTS NO THREAT TO THE FEDERAL ASSOCIATIONS OR TO ANY NATIONAL INTEREST; A FINDING OF PREEMPTION WOULD CREATE A PRIVILEGED CLASS OF PRIVATE LENDERS IMMUNE FROM BUT FREE TO TAKE ADVANTAGE OF CALIFORNIA'S GENERAL LAWS OF PROPERTY AND CONTRACT.

1. The Federal Associations Perform A Function Indistinguishable From State-Chartered Savings and Loans.

The central issue presented in the instant case is whether federally-chartered savings and loan associations are immune from state laws and policies favoring the free

alienation of real property located within the state.[10] In resolving this issue it is well to consider the role played today by the federally-chartered associations.

The federal associations were created during the Roosevelt Administration to enter intrastate mortgage money markets and to make available additional sources of long-term home loans, particularly in the roughly one-half of the counties nationwide without local thrift or savings and loan institutions.[11] They are purely private institutions, are not federal instrumentalities, and do not perform any uniquely federal functions. *Gibson v. First Federal Sav. & Loan Ass'n.*, 347 F.Supp. 560, 563 (E.D. Mich. 1972); *Midwest Federal Sav. & Loan Ass'n. v. Commissioner of Reference*, 259 N.W.2d 596, 598 (Minn. 1977); cf. *United States v. Orleans*, 425 U.S. 807 (1976); *Perez v. United States*, 594 F.2d 280 (1st Cir. 1979); *The Housing Authority of the City of Seattle et al. v. State of Washington*, 629 F.2d 1307 (9th Cir. 1980).

Today, the federal associations compete directly with state-chartered institutions in identical markets for real estate secured mortgages.[12] As the facts of this case show, savings and loan associations with both types of charters

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[10]Appellants have not challenged the correctness of the conclusion reached by California courts and the courts and legislatures of 16 other states that automatic exercise of the due-on-sale clause creates substantial and pernicious restraints on alienation.

[11]7 Marvell, *The Federal Home Loan Bank Board*, pp. 18-19 (1969); HOLA § 5(a), 48 Stat. 128, 132 (1933), 12 U.S.C. § 1464 (a); cf. Report of the House Committee on Banking and Currency (HR Rept. No. 55) 73rd Cong. 1st Sess., p. 2 (April 25, 1933); Hearings on HOLA HR 4980, HR Committee on Banking and Currency, pp. 14-15 (April 21, 1933).

[12]The proliferations of both state and federally-chartered institutions has left few, if any, areas of the country without at least several institutions with each type of charter. Appellants have never suggested that the federal associations serve any population not also served by their state-chartered competitors.

typically use the same "uniform" mortgage instruments, sell mortgage paper on the same secondary markets, and freely exchange their federal charters for state charters (or vice versa) with an effort to seek the most favorable regulatory climate.[13] With minimum exceptions, both types of associations operate strictly within the boundaries of a single state.[14]

Moreover, as discussed more fully below, the federal associations continually observe and utilize state laws. They do so for the simple reason that there exist no federal statutes or regulations pertaining to most aspects of their lending practices or to their contractual dealings with borrowers.[15]

2. The Ability Of Federal Savings and Loan Associations To Include Automatically Enforceable Due-On-Sale Clauses In Their Mortgage Instruments Is Not An Issue of National Significance And Is Not A Substantial Factor In The Solvency Or Well-Being Of The Federal Associations.

Appellants, in their Jurisdictional Statement, have placed great reliance on the claim that uniform national standards for the enforcement of due-on-sale clauses are essential to the financial well being of the federal associations. The fallacy of this claim can be demonstrated in a number of ways.

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[13]The extremely significant fact that Pan American voluntarily exchanged its federal charter for state status during the cause of this litigation will be discussed elsewhere in this brief.

[14]12 C.F.R. 545.8-6 (1980) and proposed 556.5(a)(3) in 45 F.R. 31121 (May 12, 1980). The exception is for institutions which were multi-state upon conversion to federal status. Hearing before the House Subcommittee Financial Institutions, HR 3864, p. 163 (96th Cong. 1st Sess., May 15-17).

[15]An illustrative case is *Glendale Federal Sav. & Loan Ass'n. v. Marina View Heights Dev. Co.*, 66 C.A.3d 101 (1977), in which a federal association claimed the benefit of a plethora of California laws without so much as a suggestion of federal preemption.

First, the Federal Home Loan Bank Board (Bank Board) has done nothing to mandate the inclusion or exercise of due-on-sale clauses in the mortgage instruments of federal associations. The Bank Board's 1976 regulations *permit* inclusion of a due-on-sale clause but leave the existence, nature, and extent of any due-on-sale language to be decided contractually by the individual lender and borrower. 12 C.F.R. § 545.6-116. It is extremely difficult to establish a need for national uniformity in the enforceability of due-on-sale clauses when the Bank Board has left even the inclusion of due-on-sale language to be determined on a contract-by-contract basis.

> "If this [claimed] national interest were indeed an important policy, it seems that the inclusion of such clauses would be mandated rather than permitted."
>
> *Holiday Acres v. Midwest Federal Sav. & Loan Ass'n.*, 308 N.W.2d 471 (Minn. Supreme Ct. 1981). Quoted with approval in decision below,[16] and in *de la Cuesta v. Fidelity Federal Sav. & Loan Assn.*, 121 C.A.3d 328 (1981).[17]

Second, Appellants have offered no documentation supporting the claim that California's due-on-sale restrictions will have either a national or a significantly adverse impact on federal associations.[18] Indeed, the evidence is to the contrary. Thus, as Appellants admit, Pan American converted to a *state*-charter shortly after winning its summary judment motion on the preemption issue in the trial court below. Jurisdictional Statement, p. 4, fn. 4 as corrected by printer's erratum. Pan American's voluntary

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[16]Appendix at A-9.

[17]Jurisdictional Statement pending before this Court, Docket No. 81-750.

[18]Pan American's conduct is consistent with actions by numerous other federal savings and loan associations in California which have freely and voluntarily observed California's restrictions on automatic due-on-sale acceleration.

decision to become a state-chartered institution immediately after winning the "benefit" of purportedly preemptive federal law is, perhaps, the most credible and telling evidence imaginable that Pan American does not believe that preemption of California law is necessary to its continued financial health.[19]

It may be true that it would be "advantageous" to the federal associations to disregard California's due-on-sale restrictions. However, this fact alone is not a sufficient basis for a finding of federal preemption. It would also be advantageous to the "federals" to be able to obtain deficiency judgments prohibited by California law, to obtain "strict foreclosure" of mortgages upon default without the necessity for competitive sale, to disregard the reinstatement and redemption rights of their defaulting borrowers, or to claim priority for their mortgage liens regardless of the sequence of recordation, and it would undoubtedly be advantageous to the federal lenders, as they claim in the instant litigation, if they could choose between "preemptive" federal law and state law, selectively and at will.

Such a result would make a mockery of the doctrine of preemption and of the Tenth Amendment, and would leave traditional state real property law riddled with inconsistencies. This situation would be contrary to the overwhelming body of authority holding that matters of contract and real property, far from being inherently national, are matters

[19]No empirical evidence exists establishing that savings and loan associations in California or in other states with due-on-sale restrictions are less profitable than those located in states which have no such restrictions. California's savings and loan industry, which has been subject to the *Wellenkamp* rule for almost four years, was recently described as being in a condition "more favorable than that prevailing elsewhere". Editorial entitled "Helping Hand Needed for S&Ls", published in the San Francisco Examiner, June 25, 1981, cited favorably by the California Banker's Association in an amicus brief arguing for severe restriction of *Wellenkamp* offered in *Dawn Investment Co. v. Superior Court*, pending California Supreme Court.

of uniquely local concern. *Aronson v. Quick Point Pencil Company, supra; State Land Board v. Corvallis Sand & Gravel Co., supra; United States v. Little Lake Misere Land Company, Inc., supra; Sunderland v. United States,* 266 U.S. 226 (1924); *United States v. Fox, supra.* "It is a strange argument that permits one to pick and choose what portion of the law binds him." *First Nat. Bank v. Walker Bank,* 385 U.S. 252, 261 (1966).

B

THE DECISION BELOW CORRECTLY APPLIED ACCEPTED PREEMPTION ANALYSIS IN REACHING THE CONCLUSION THAT FEDERALLY-CHARTERED SAVINGS AND LOAN ASSOCIATIONS ARE NOT EXEMPT FROM CALIFORNIA'S RULE AGAINST RESTRAINTS ON ALIENATION.

Appellants do not claim that Congress has expressly preempted the state laws at issue here. Thus, any finding of preemption must necessarily be based on implicit preemption by Congress through "occupation of the field" or on the existence of Bank Board regulations which conflict with state law. The California Court of Appeal correctly concluded that Congress has not occupied the relevant field and that California law restricting automatic due-on-sale acceleration does not conflict with any federal statute or regulation.

1. The Content and Legislative History of the Home Owners Loan Act and Subsequent Actions By the Bank Board Affirmatively Establish That Congress Has Not Preemptively Occupied the Field in Question.

Where Congress has "occupied the field", state laws are automatically and arbitrarily ousted even if they are consistent with or complimentary to federal law. *Campbell v. Hussey,* 368 U.S. 297 (1961); see, also, *People v. Conklin,* 12 C.3d 259 (1974); *Textile Workers Union v. Lincoln Mills*

of Alabama, 353 U.S. 448, 456-457 (1957); D. Currie, *Federal Courts* (2d ed. 1975) pp. 886-888.

An erroneous finding of occupation of the field can create a legal vacuum from which state law has been ousted and into which Congress is not prepared to step. For this reason, the occupation of the field theory of preemption has always been very narrowly circumscribed.[20]

A finding of "occupation" must be based on a showing that exclusive federal control is "the clear and manifest purpose of Congress". *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963). Indeed, the required showing has been described by some commentators as tantamount to a showing of specific Congressional intent. See, Bratton, *supra; cf. New York State Dept. of Soc. Se v., et al. v. Dublino, et al.*, 413 U.S. 405 (1973); *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).

Further, a finding of Congressional occupation may not be inferred merely from the fact that federal regulation of a field is extensive or comprehensive, or from the fact that a state law hypothetically conflicts with or impedes a federal goal or purpose.[21] *Dublino, supra; Kelly v. Washington*, 302 U.S. 1, 13 (1937); *Younger v. Jensen*, 26 C.3d 397, 409 (1980); *Derenco, Inc. v. Benjamin Franklin Sav. & Loan, supra.*

Even where Congressional occupation has occurred, this Court has sought to define the "field" of occupation in a

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[20]The Oregon Supreme Court has concluded that the already restrictive "occupation of the field" theory has been "losing ground" during the past decade. *Derenco, Inc. v. Benjamin Franklin Federal Sav. & Loan Ass'n.*, 577 P.2d 477, 484 (S.Ct. Ore. 1978); cf. Bratton, *The Preemption Doctrine: Shifting Perspectives on the Burger Court*", 1975 Column.L.Rev., pp. 18-19.

[21]"The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . ." *Dublino, supra*, 413 U.S. at 413.

manner sufficiently narrow to exclude and preserve matters of traditional or vital state interest. *DeCanas, supra; Goldstein v. California*, 412 U.S. 546 (1973); cf. *Derenco, supra*, 577 P.2d at 484 (fn. 8).

Moreover, the bias against preemption is particularly strong where the law in question is, like the law of real property and mortgages, historically subject to virtually exclusive state control, and where the parties claiming preemption are acting in an intrastate commercial context. See, *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979); *Butner v. United States*, 440 U.S. 48 (1979); *United States v. Yazell, supra; Katherine Gibbs Sch. (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979).

A review of the legislative history of the Home Owners' Loan Act (HOLA) discloses none of the indicia of federal occupation of the field.

HOLA is a product of the Great Depression, and was designed to address the shortage and maldistribution of state-chartered savings and loan institutions.[22] Congress' strategy in enacting HOLA was to create a new generation of purely private intrastate savings and loan institutions which would ". . . operate locally and be managed locally", and observe the "best practices" of local thrift institutions. S.Docs. 71-1, Vol. 9-90 (June 6, 1933), Statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board.

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[22]Separate legislation creating the Home Owners Loan Corporation ("HOLC"), 48 Stat. 128 (1933) (amended 1953 and repealed 1966), was designed to remedy "certain pernicious practices" used by some local lending institutions. The pernicious practices in question were balloon payments and short term lending. It would be ironic in the extreme if the doctrine of federal preemption was now used to frustrate state efforts to eliminate the arbitrary use of due-on-sale provisions by all lending institutions, including federal associations, in a manner which, in effect, creates short-term loans and balloon payments, in the guise of long-term loans.

Congress was certainly aware that the new federal associations would necessarily operate in the context of state law, particularly with respect to their contractual dealings with borrowers and their security interests in real property located within the host state. In the absence of any federal scheme of contract or land law, there simply was no other option.[23]

And as noted by the State Court of Appeal, Congress has acted quite explicitly in those few cases where it deemed state law to be inappropriate. See 12 U.S.C. § 1464(a)(1), § 1464(b)(3) and § 1464(h).

In the roughly 40 years since HOLA was enacted, neither Congress nor the Bank Board has attempted to supplant state law with even a rudimentary body of federal law concerning the contractual and property rights of the federal associations.

There is, then, no comprehensive federal scheme, no express indication of federal preemptive intent, and no congressional purpose which necessarily requires preemption; in other words, none of the indicia of Congressional occupation of the field. To the contrary, the federal associations remain wholly dependent upon the state laws which would automatically be preempted if Congress had occupied the field. *Campbell v. Hussey, supra.*

2. The Distinction Drawn by the California Court of Appeal Between the Internal and External Affairs of the Federal Associations is Entirely Consistent with the Congressional Purpose of HOLA and the Function of the Federal Associations

As federally-regulated private entities operating in intrastate markets controlled by state laws, the federal associations necessarily have a dual nature. In their creation, organization and termination they are federally-regulated. But, as shown, in their dealings with borrowers

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[23]See authorities cited at fn. 11 on p. 10, *supra*.

they necessarily function under state law. It is, therefore, inherent in the very scheme of things that federal control ends and state control begins at some point. The Court of Appeal below described that point in terms of a distinction between "internal" and "external" affairs.

This distinction finds support in an authoritative decision more recent than any cited by Appellants in support of their claim of "cradle to grave" preemption, *Gulf Federal Sav. & Loan, etc. v. Federal Home Loan Bank Board*, 651 F.2d 259 (5th Cir. July 15, 1981).

Gulf Federal involved a dispute between a federal association and the Bank Board concerning the Board's authority to issue cease and desist orders concerning the contractual dealings between a federal association and its borrowers. The Bank Board responded to Gulf Federal's challenge with its customary claim of plenary "cradle to grave" preemption.

In rejecting this "cradle to grave" claim the Fifth Circuit stated:

> "These cases [*Murphy* and *Rettig*[24]] and others like them cited by the Board, stand only for the proposition that federal law governs the *internal management* of federal savings and loan institutions.
>
> "Gulf Federal's conduct in this case, however, has nothing to do with the internal management of the association. The disputed loan provision is part of a contract between the association and its borrowers. Such contracts do not implicate the sound management of the savings and loan or the insurance liability of the government, nor do they require a uniform federal rule to assure sound and well-managed savings and loan institutions. See, *DeSimone v. Warwick Federal Savings and Loan Ass'n.* (D.R.I. 1980) 482 F.

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[24] *Murphy v. Colonial Sav. & Loan Ass'n.*, 388 F.2d 609 (2d Cir. 1967) and *Rettig v. Arlington Heights Federal Sav. & Loan Ass'n.* 405 F.Supp. 819 (N.D. Ill. 1975).

> Supp. 1190, 1194. Federal law does not establish whether Gulf Federal breached its agreements. *Gulf Federal's loan agreements were made under Louisiana law, and Louisiana law must determine the rights of the parties to the contract."*
>
> *Gulf Federal, supra,* at p. 266 (emphasis in first paragraph in original; emphasis in second paragraph supplied).

Appellants, while not citing *Gulf Federal,* have tacitly recognized the internal/external distinction, given the private, intra-state character of the federals and the absence of any federal law affecting most aspects of their day-to-day lending activities. Jurisdictional Statement, pp. 19-20. However, they seek to avoid the implications of the distinction, at least insofar as applicable to the due-on-sale controversy, by offering the following syllogism: The "external" matters affect the financial condition of the association and the financial condition of an association is an "internal" affair. *Id.* But this argument begs the question. Any aspect of local law—zoning, recording rights, restrictions on recovery of deficiency judgments, policy limitations on "release" and "subordination" clauses—affects the financial condition of the lender. Some facets of California's law of real property and mortgages are deemed "favorable" to lenders and some "favorable" to borrowers. However, Appellants have not claimed that California's real property laws are biased against the federal associations or even aginst lenders generally. It is difficult to see how the federals claim the benefit of any California laws if these laws are preempted merely because they have some financial impact on the associations.

The fact remains that Appellants seek a preemption standard which would permit them to choose at their whim between state and federal law. Such a rule would give them an unwarranted competitive advantage over their state-chartered competitiors, would leave borrowers uncertain as to what law would apply to a contract with a "federal",

and would frustrate the primary congressional purpose of HOLA.[25]

3. California Law Restricting Automatic Due-On-Sale Acceleration Does Not Conflict With the 1976 Regulations of the Bank Board.

Conflicts between state and federal law are not to be sought out. *Joseph E. Seagram & Sons, Inc. v. Hofstetter*, 384 U.S. 35, 45 (1966); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960).

> "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'."
>
> *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

To serve as a basis for preemption, state/federal conflicts must not only be direct, but must also be actual and not merely hypothetical. *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117, 130 (1977); *Joseph E. Seagram & Sons, Inc. v. Hofstetter, supra*, 384 U.S. at 45. No actual conflict can reasonably be said to exist with respect to the application of California law respecting restraints on alienation to due-on-sale clauses in the loan instruments of federal associations.

The Bank Board's 1976 due-on-sale regulations[26] are clearly permissive and not mandatory.

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[25]Any inconsistency between *Gulf Federal, supra*, and *Meyers v. Beverly Hills Federal*, 499 F.2d 1145 (9th Cir. 1974) demonstrates that *Meyers* is a poorly reasoned decision. *Meyers* was poorly briefed and its "supposed ruling" on the issue of removal jurisdiction in preemption cases has recently been roundly criticized by the Ninth Circuit. *Guinasso v. Pacific First Federal Sav. & Loan Ass'n.*, 656 F.2d 1364, 1366 (9th Cir. 1981).

[26]12 C.F.R. § 545.6-11(f) and (g) (1979); now in slightly modified form at 12 C.F.R. § 545.8-(3)(f) and (g). The original classification will be used throughout this brief.

By these regulations the federal associations are empowered to include and exercise due-on-sale clauses. 12 C.F.R. § 545.6-11(f) (1979).

California law is in complete accord. Nothing in the *Wellenkamp* decision or elsewhere in California law prohibits the inclusion of the due-on-sale clause in any loan agreement or its exercise in any manner which will not impair the state's compelling interest in the free alienability of real property located within its borders.

a. By Designating the Contract as the Controlling Authority, the Bank Board Has Avoided Preemption of State Law.

Any state/federal conflict must arise out of California's limiting the circumstances in which the federals can invoke due-on-sale acceleration. Appellees submit that there exists no conflict with respect to these restrictions on the use of due-on-sale clauses and that such a conflict, were it to exist, could not serve as a basis for preemption.

A conflict might have arisen had the Bank Board attempted to oust state law by giving the federal associations absolute discretion regarding their use of due-on-sale acceleration.[27] However, this is not what the Bank Board did. Instead, the Board provided, *inter alia*, that:

> ". . . exercise by an association of such an acceleration option . . . shall be governed exclusively by the terms of the contract between the association and the borrower, and all rights and remedies of the association and the borrower thereto shall be fixed and governed by said contract."
>
> 12 C.F.R. § 545.6-11(f) (1979).

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[27]Of course, giving totally private business organizations unfettered discretion in their business dealings with private lenders would have been, at best, constitutionally dubious on a variety of grounds. See, e.g., *National Association of Independent Television Producers and Distributors v. F.C.C.*, 516 F.2d 526 (2d Cir. 1975) (invalid delegation).

Thus, the Bank Board did not purport to give the federals unilateral discretion to make their own due-on-sale law.

Significantly, in stepping back from the anarchy of self-regulation, the Bank Board did *not* provide that the exercise of the acceleration clause would be governed by federal law. The Board thereby implicitly recognized that no federal law exists which is capable of governing the exercise of the due-on-sale option, let alone all "rights and remedies" of the real property secured lender and borrower.

In determining that the contract would "govern", the drafters of the 1976 regulations certainly were aware that all contracts are necessarily subject to interpretation and to the implication of terms required to effectuate the intent of the parties. The drafters were also aware, or were chargeable with the knowledge, that state law controls the validity and interpretation of contracts. *Aronson v. Quick Point Pencil Co., supra; Pickering Lumber Corp. v. Whiteside, supra,* 54 C.A.2d at 210, *certiorari denied* 318 U.S. 763 (". . . any contract affecting title to the real property situated in California is to be construed according to the laws of California"); *Gruen Watch Co. v. Artists Alliance,* 191 F.2d 700, 703 (9th Cir. 1951); *Riess v. Murchison,* 329 F.2d 635, 643 (9th Cir. 1964); Cal. Civ. Code § 1646 (contracts to be interpreted according to law of place of making); Cal. Civ. Code § 1634 (all contracts to be interpreted by same rules); Code Civ. Proc. § 1857 (contracts to be interpreted according to meaning in place of execution). Moreover, the drafters knew very well that in interpreting contracts, state courts necessarily take into consideration important state policy considerations.[23]

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[23]The interplay between policy and interpretation is unavoidable and salutary. Thus, for example, when a court limits an unspecified contractual time period to a "reasonable period of time" the court effectuates a public policy favoring reasonableness and it also insures the greatest chance of effectuating the intent of the parties

Since contracts always involve a potential for requiring interpretation of terms, state law commonly provides rules for their interpretation; the Bank Board has designated no other source of law for rules of contractual interpretation, and by providing that the contract governs, the Board has done nothing to diminish the states' pre-1976 authority. This has left the door wide open for state law limitations on the exercise of due-on-sale rights. *Joseph E. Seagram & Sons, Inc. v. Hofstetter, supra; Huron Portland Cement Co. v. City of Detroit, supra.*

b. Purely Permissive Federal Regulations Cannot Preempt.

A second and independent reason why no conflict can be said to exist is that the 1976 regulations are purely permissive. The decision to exercise due-on-sale acceleration is that of the federal association and not that of the Bank Board. It is entirely possible for a federal association to comply with California's limited restrictions on the exercise of due-on-sale rights without violating federal law. There is no conflict giving rise to preemption.

A number of decisions have expressly rejected claims of federal preemption, finding, instead, federal/state regulatory compatability. In *McClellan v. Chipman*, 164 U.S. 347, 356-357 (1896) the Court held that a state law precluding banks from taking real property as security for a pre-existing debt was valid as applied to a national bank, even though the National Bank Act expressly authorized

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(or the intent which they would have formed had it occurred to them to consider the question). Similarly, whatever their protestations in court, a lender would never describe a due-on-sale clause to a prospective borrower as giving that lender the right to accelerate the loan arbitrarily or because the interest rate is not high enough. The borrower expects (and the lender knows that the borrower expects) the lender to act reasonably and according to legitimate business purposes. Thus, in limiting the exercise of due-on-sale acceleration to instances in which it is reasonable and supported by some valid business purpose, the court is effectuating *both* public policy and the tacit expectations of the parties.

such a taking. Similarly, the Court noted no "impossibility of dual compliance" where fruit growers could have complied with both standards by changing their harvesting methods. *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142-143 (1963).

Other decisions firmly support the view that relevant California law and federal regulations are complimentary. See, *Huron Portland Cement Co. v. City of Detroit, supra,* 362 U.S. at 446-448 (federally licensed vessel subject to nondiscriminatory state laws); *Kargman v. Sullivan,* 552 F.2d 2, 6, 13 (1st Cir. 1977), *reh. denied* 558 F.2d 612 (1977) *and later app.* 582 F.2d 131 (1978) (federal permission to raise rents does not justify violation of rent control law where federal action permissive, not mandatory); *Hughes v. Trans World Airlines, Inc.,* 336 A.2d 572, 578-579 (Del. 1975), *cert. denied* 423 U.S. 841 (1975), *and on remand* 374 A.2d 5 (Del. Ch. 1977); *State ex rel. Andrus v. Click,* 554 P.2d 969 (Idaho 1976); *Marshall v. Consumers Power Co.,* 237 N.W.2d 266, 280-281 (Mich. 1976).

It is entirely possible for federal associations to fully protect themselves and to comply with *all* federal laws without arbitrarily invoking due-on-sale clauses for reasons unrelated to the protection of their security. Thus, California and federal laws are complimentary, and there exists no reason to cut a broad swath through California laws protecting its consumers and favoring the free alienability of land contained within its borders.

c. A Mere Expression of Preemptive Intent By the Bank Board Cannot Give Rise to Preemption in the Absence of a Direct Conflict Between State and Federal Law.

The Court of Appeal correctly noted that only Congress has the power to preempt state law by fiat and that federal regulatory agencies can preempt state laws, particularly those within the sphere of traditional police powers,

only by enacting duly authorized regulations which irreconcilably conflict with state law. (Appendix at A-6).

Appellants disagree. They contend that a mere expression of preemptive intent by a federal regulatory body is sufficient to preempt. However, none of the cases cited by Appellants support this claim. Thus, *Free v. Bland* 369 U.S. 663 (1962); *United States v. Shimer* 367 U.S. 374 (1961); *Leslie Miller, Inc. v. Arkansas* 352 U.S. 187 (1956) and the other cases cited by Appellants[29] all involved actual, present and irreconcilable conflicts between a properly enacted regulation and state law. Moreover, the dictum from *City of Burbank v. Lockheed Air Terminal, Inc.* 411 U.S. 624 (1973) quoted at page 23 of the Jurisdictional Statement actually contradicts Appellants' position.[30]

There is no place in our scheme of federalism for preemption by regulatory fiat. Where a regulatory agency enacts specific regulations which conflict with a state law, the agency has, presumably, thought through the problems in response to which the preempted state law has evolved. But where, as here, an agency attempts to preempt large sections of traditional state law without developing a detailed body of law to replace state law, the result will inevitably be confusion and state/federal antagonism. In fact, it is the "intent of Congress" which triggers preemption and it is only where a regulatory agency has enacted duly-authorized regulations *unavoidably* conflicting with state law that a congressional intent to preempt will be inferred. *Malone v. White Motor Corp.* 435 U.S. 497 (1978); *Florida Lime, supra;* see, also, *Chrysler Corp.*

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[29]See Jurisdictional Statement, p. 23.

[30]Thus, in *City of Burbank*, this Court said: ". . . and very likely the authority conferred on the [regulatory agency] is sufficient to authorize him to promulgate regulations *effectively* pre-empting local action". 411 U.S. 624, 653 (emphasis added). Unless the term "effectively" is to be treated as pure surplusage, it must mean that regulatory preemption may occur only where valid regulations have had the effect of displacing state law.

v. Brown 441 U.S. 281 (1979); Hirsh, *Toward a New View of Federal Preemption*, 1972 Univ. of Ill. L.Forum 515, 551; *Bratton, supra.*

C

THE COURT OF APPEAL CORRECTLY CONCLUDED THAT PAN AMERICAN WAIVED ANY CLAIM THAT FEDERAL LAW PREEMPTS CALIFORNIA DUE-ON-SALE RESTRICTIONS.

Since at least 1872 California has exercised plenary authority over real property located within the state. Cal. Civ. Code § 155.[21] Thus, the ordinary and popular interpretation of any real property contract or instrument executed within California, pertaining exclusively to California land and selecting the "law of the jurisdiction" as the applicable general law, would be that the phrase "jurisdiction" means the State of California.

This natural interpretation is reinforced by the fact that such a clause would be nonsensical if "jurisdiction" were taken to mean the United States. This is the case because the United States does not claim authority over intra-state land which it does not own and because, as discussed, there simply is no federal law of real estate or mortgages. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363 (under federal system property ownership governed by state law, not general federal law); *City of Milwaukee v. Illinois and Michigan* 101 S.Ct. 1784 (1981).

Indeed, land law and the law of real estate mortgages are the quintessential subjects of state law:

> "It is true, too, that '[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' Even

[21] California's original Civil Code, largely borrowed from New York's, was enacted in 1872.

when federal general law was in its heyday, an exception was carved out for local laws of real property. Indeed, before *Erie R. Co. v. Tompkins, supra,* this Court's opinions left open the possibility that even 'the United States, while protected by the constitution from discriminatory state action, and perhaps certain other special forms of state control, was nevertheless governed generally in its ordinary proprietary relations by state law.' Hart, *The Relations Between State and Federal Law,* 54 Col. L.Rev. 489, 553 (1954)." *United States v. Little Lake Misere Land Company, Inc.,* 412 U.S. 580, 591-92 (1973) (citations omitted).

The words of the often-cited unanimous decision of *United States v. Fox, supra,* 94 U.S. 315, are as accurate today as they were a century ago:

"The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testimentary disposition of it may be exercised by its owners, is undoubted. It is an established principal of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode is *exclusively* subject to the government within whose jurisdiction the property is situated. (Citation omitted). The power of the state follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressed or by necessary implication transferred to the federal government. The title and modes of disposition of real property within the state, whether inter vivos or testimentary, are not matters placed under the control of federal authority." *United States v. Fox, supra,* 94 U.S. at 320-321) (emphasis supplied); *cf. United States v. Burnison,* 339 U.S. 87, 91-92 (1950) (in which seven Justices specifically declined to overrule *Fox, supra*).

Appellants offer the argument that the phrase "law of the jurisdiction" really means "the law of California, which has totally been preempted, and therefore federal law".[32] There are numerous flaws in this argument.

First, it must be recalled that the issue in this case is not a theoretical consideration of federalism, but instead the *interpretation* of adhesive contractual language imposed by an institutional lender and, at best, individual borrowers. It must also be recalled that state and federally-chartered lenders routinely use an identical clause.[33]

Second, Appellants' argument would mean that identical contractual language would have diametrically opposite meanings when used by a federal association or by its state-chartered competitor across the street.

Third, if we accept Appellants' occupation of the field arguments, the "choice of law" clause would be surplusage when used by a federal association because there can be no conflict of laws if a uniform, preemptive body of federal law controls. Of course no such body of law exists, but this "technicality" has not deterred Appellants.

Fourth, even if a preemptive federal common law of contracts did apply, there is no reason to believe that such law would be inconsistent with California's restrictions on automatic due-on-sale acceleration based on Cal. Civil Code

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[32]Appellees anticipate that the Appellants will argue, as they have below, that they were not really serious in claiming "cradle to grave preemption" and that not "all" state laws affecting the federal associations are preempted. If Appellants do so argue, Appellees invite them to suggest a line of reasoning more rational and better suited to the real operation of the federal associations than the "external/internal" distinction adopted by the Court below. See, discussion, *supra*, at p. 17 et. seq.

[33]The fact that identical deed of trust forms are used by lenders with both types of charters speaks volumes about the indistinguishable functions and character of state and federal savings and loan institutions.

§ 711. Where federal law for some reason controls in an area typically the subject of state law, federal law will, except in unusual cases, "adopt" state law.

> "In the absence of some overriding federal interest in uniformity, the applicable state law generally provides the rule of decision." *United States v. Conrad Publishing Company* 589 F.2d 949, 953 (1978) (citations omitted); citing and relying on *United States v. Yazell* 382 U.S. 341 (1966); *United States v. Marshall* 431 F.Supp. 888-891 (N.D. Ill. 1977).

Accord: *United States v. Kimball Foods,* Inc. 440 U.S. 715 (1979); *United States v. Hargrove* 494 F.Supp. 22, 23 (D.C. N.M. 1979); *cf.* Mishkin, *The Variousness of "Federal Law": Competence and Discretion In the Choice of National and State Rules for Decision* 105 U.Pa.L.Rev. 797 (1975).

Indeed, where there exists a rational body of state law, it is "inappropriate" for courts to develop a specialized body of (federal common) law applicable to the activities of a particular federally-related entity or instrumentality. *United States v. Conrad Publishing Company, supra,* 589 F.2d 949 at 953 (Small Business Administration).[34]

The foregoing makes clear that, in interpreting the choice of law clause as a waiver, the Court of Appeal was correctly applying at least five principles of contract interpretation firmly embedded in California law and the general common law. The Court gave the words of the clause their ordinary and usual meaning. Cal. Civ. Code § 1644. It interpreted any ambiguity against the party who caused that ambiguity to exist. Cal. Civ. Code §1654. It gave the clause a uniform interpretation, whether used by state or federally-chartered lenders. Cal. Civ. Code § 1635. And it avoided an interpretation which would have made a choice

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[34]Moreover, federal courts have found the reasoning of *Wellenkamp* to be compelling and widely applicable to secured transactions of all types. See, e.g., *Brown v. Avemco Inv. Corp.* 603 F.2d 1367 (9th Cir. 1979) (required showing of impaired security prior to foreclosure under U.C.C., relying on *Wellenkamp, supra*).

of law clause a contradiction in terms and a total irrelevancy. Cal. Civ. Code §§ 1641 and 1643.

As discussed above,[35] the Court's acts of contract interpretation do not raise a federal question and are not subject to review pursuant to 28 U.S.C. § 1257. *Aronson v. Quick Point Pencil Co., supra.*

CONCLUSION

Appellants would have this Court make deep inroads into an area of the law which is literally at the heart of the traditional police powers of the state, in order to gain a commercial advantage for purely private institutions operating exclusively within the boundaries of a single state. Moreover, Appellants ask this Court to find preemption despite a total lack of Congressional preemptive intent.

However, the days are long past when it was assumed *a priori* that federal control is better just because it is federal. In an era when previously unknown economic conditions have placed borrowers and lenders alike on the defensive, it is all the more urgent that this Court reaffirm the concept of federalism which has given the United States two hundred years of diversity and the freedom to experiment. The unexpressed desire of a federal regulatory body to spare its private regulatees the growing pains of adjustment to new economic conditions which all of us must experience, and the understandable enthusiasm of the regulatees to accept this benefit, cannot justify doing violence to the Tenth Amendment and to the most traditional of states' rights, that is, to control the land within their borders.

Respectfully submitted,

JOHN R. HETLAND
CHARLES A. HANSEN
DONALD M. AHLBACH
Attorneys for Appellees

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[35] See Motion to Dismiss, section B.

Appendix

Appendix A

[Civ. No. 47918. First Dist., Div. One. June 1, 1981.]

Stanley E. Panko et al., Plaintiffs and Appellants, v. Pan American Federal Savings and Loan Association et al., Defendants and Respondents.

OPINION

Racanelli, P. J.—In this appeal we address the question whether the rule announced by our Supreme Court in *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943 [148 Cal.Rptr. 379, 582 P.2d 970] applies with equal force to a federally chartered savings and loan association. We hold that *Wellenkamp* applies; accordingly, we reverse the judgment.

Facts

Joseph and Sandra Karp were owners of a commercial building in San Mateo. In November 1977 they refinanced the property, obtaining a loan from Pan American Federal Savings and Loan Association for $161,000, bearing interest at the rate of 10 percent per annum, secured by a deed of trust.[1] The deed of trust contained a standard due-on-sale clause providing for accelerated payment in the event of sale.

In June 1978 the Karps sold the property to plaintiffs, Stanley Panko and George Sinclair, who took title to the property "subject to" the Pan American deed of trust.

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[1]The refinancing was part of an option agreement between the Karps and plaintiffs. An abstract of option agreement was recorded on November 13, 1977. A termination of option agreement was recorded on December 2, 1977. An abstract of option agreement was rerecorded on December 5, 1977 Thus, at the time of the Karps' refinancing (Nov. 28, 1977), Pan-American had constructive notice of plaintiffs' option to purchase the property.

Plaintiffs tendered a timely monthly payment due to Pan American in July 1978, but Pan American declined to accept it. Acting under the authority of the due-on-sale clause, Pan American demanded full payment of the loan balance.

On August 18, 1978, Pan American recorded a notice of default citing the Karps' "failure to pay Interest and Principal payments." On November 21, 1978, plaintiffs filed a complaint for declaratory and injunctive relief seeking to enjoin Pan American from enforcing the due-on-sale clause. Thereafter, Pan American moved for summary judgment on the ground that federal statutes and regulations governing federally chartered savings and loan associations preempted California law and permitted enforcement of the due-on-sale clause. The trial court granted the motion and dismissed the action. This appeal ensued.

Background

In recent years the validity of due-on-sale clauses has been a matter of considerable controversy in state and federal courts. In California our Supreme Court has determined that enforcement of a due-on-sale clause upon occurrence of an outright sale constitutes an unreasonable restraint on alienation "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." (*Wellenkamp v. Bank of America, supra,* 21 Cal.3d at p. 953.) The court's decision was grounded on Civil Code section 711,[2] foreshadowed by two earlier interpretations of that statute. (See *Tucker v. Lassen Sav. & Loan Assn.* (1974) 12 Cal.3d 629 [116 Cal.Rptr. 633, 526 P.2d 1169] [due-on-sale clause not automatically enforceable upon execution of installment sale contract]; *LaSala v. American Sav. & Loan Assn.*

[2]Section 711 of the Civil Code provides: "Conditions restraining alienation, when repugnant to the interest created, are void."

(1971) 5 Cal.3d 864 [97 Cal.Rptr. 849, 489 P.2d 1113] [acceleration clause not automatically enforceable upon creation of junior encumbrance].)

Here, Pan American concedes that it can make no showing of an impairment to its security or risk of default as a result of the outright sale of the property to plaintiffs. Consequently, under California law the due-on-sale clause contained in the deed of trust herein would not be enforceable.[3] Pan American, a federally chartered savings and loan association, contends that it can not be bound by California law since it is exclusively governed by regulations of the Federal Home Loan Bank Board (Board) which preempt conflicting state laws.

In 1933 the Home Owners' Loan Act (12 U.S.C. §§ 1461-1470) was enacted by Congress creating the Board and authorizing the establishment of federal savings and loan associations. While the associations are specifically empowered to extend real estate loans (12 U.S.C. § 1464 (c)(1)(B) and (c)(2)(A)), the statute is silent with respect to due-on-sale clauses or other loan details.

The Board is statutorily authorized to promulgate regulations[4] and has shown no reluctance to do so. (See 12 C.F.R. §§ 541-546.) The first specific mention of due-on-sale clauses, however, did not appear until a regulation was

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[3]We note that in *Wellenkamp* the property was an owner-occupied single family dwelling, whereas here the property is investment commercial property. While we are aware that a similar question is presently pending before the California Supreme Court (*Dawn Investment Co. v. Superior Court* (L.A. 31413) hg. granted April 29, 1981), we perceive no sound reasons to now restrict the *Wellenkamp* doctrine exclusively to residential property.

[4]"In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations

enacted, effective July 1, 1976, providing as follows: "An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." (12 C.F.R. § 545.6-11(f), amended and recodified at § 545.8-3(f) (1980).)

The pivotal question to be decided is whether the federal regulation overrides state law embodied in California Civil Code section 711, as interpreted in *Wellenkamp*.

Federal Preemption

The preemption doctrine arises under the supremacy clause of the federal Constitution which states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law

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as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks' (but only in the case of institutions which, prior to conversion, were State mutual savings banks located in States which authorize the chartering of State mutual savings banks, provided such conversion is not in contravention of State law), and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." (12 U.S.C. § 1464 (a)(1).)

of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) But the enumerated powers of the federal government are expressly limited: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (U.S. Const., Amend. X.) The United States Supreme Court has exhibited considerable restraint in finding preemption of state law by requiring either "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] . . . evidence of a congressional design to preempt the field." (*Florida Avocado Growers v. Paul* (1963) 373 U.S. 132, 141 [10 L.Ed.2d 248, 256, 83 S.Ct. 1210]; accord *People v. Conklin* (1974) 12 Cal.3d 259, 264 [114 Cal.Rptr. 241, 522 P.2d 1049], app. dism. 419 U.S. 1064 [42 L.Ed.2d 661, 95 S.Ct. 652].)

With reference to congressional intent, the United States Supreme Court has declared that a state regulation exercising the state's "historic police powers" is not displaced by federal law "unless that was the clear and manifest purpose of Congress." (*Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525 [51 L.Ed.2d 604, 614, 97 S.Ct. 1305]; *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 1459, 67 S.Ct. 1146].) Counsel have not cited nor has our own research disclosed any reported evidence of a clear congressional mandate that federal law shall control the subject matter herein. While the Congress has unequivocally expressed its preemptive design in relation to specific areas of savings and loan association activities,[5]

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[5]The Home Owners' Loan Act specifically provides that federal savings and loan associations are exempt from state limitations on the number of branch offices (12 U.S.C. § 1464(a)(1)), but are not exempt from more stringent state laws on neighborhood discrimination or consumer credit protection. (*Ibid.*) Further, federal savings and loan associations are exempt from state taxation greater than that imposed on local financing institutions. (*Id.*, at § 1464(h).)

the Home Owners' Loan Act makes no reference to the subject of due-on-sale clauses.

It is clear that the Board has manifested its unqualified intention that the adopted regulations and implementing policy relating to due-on-sale clauses shall occupy a pre-emptive position over conflicting state law provisions.[6] Such expression of administrative intent was found controlling in *Glendale Fed. Sav. & Loan Ass'n. v. Fox* (C.D. Cal. 1978) 459 F.Supp. 903, judgment entered (1979) 481 F.Supp. 616, appeal pending (9th Cir. 1979). But we cannot equate the *Board's* expression of intent with the requisite congressional intent since the ultimate question to be answered is "whether *Congress* has . . . ordained that the state regulation shall yield." (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at p. 146 [10 L.Ed.2d at p. 259]; italics added.)

But despite the lack of express congressional design, federal law by implication may operate to the exclusion of state law "where compliance with both federal and state regulations is a physical impossibility" or where there is an "impossibility of dual compliance . . ." resulting in ". . . an inevitable collision between two schemes of regulation, . . ." (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at pp. 142-143 [10 L.Ed.2d at p. 257].)

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[6]That intent is expressed in the following language: "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed exclusively by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled solely by § 545.6-11 and the Board's new Statement of Policy. Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in § 545.6-11(g) on the ground that such . . . avoidance of limitations is permissible under State law." (Preamble to 12 C.F.R. § 545.6-11, 41 Fed. Reg. 18287 (May 3, 1976).)

In an early case a federal district court—confronted with the question whether a federally chartered savings and loan association was required to obtain a state certificate to transact business in the state—held in favor of federal preemption reasoning that: "The [Home Loan Bank] Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." (*People, etc. v. Coast Federal Sav. & Loan Ass'n.* (S.D. Cal. 1951) 98 F.Supp. 311, 316.) This broad declaration of lifetime supremacy has been cited with approval in a number of subsequent decisions uniformly holding that state law may not regulate or otherwise interfere with the internal affairs of federal savings and loan associations. (See e.g. *Conference of Federal Sav. & Loan Ass'ns v. Stein* (9th Cir. 1979) 604 F.2d 1256, affd. 445 U.S. 921 [63 L.Ed. 2d 754, 100 S.Ct. 1304] [proceedings for credit discrimination]; *Kupiec v. Republic Federal Savings & Loan Ass'n* (7th Cir. 1975) 512 F.2d 147, 150 [use of membership records]; *Meyers v. Beverly Hills Federal Savings & Loan Ass'n* (9th Cir. 1974) 499 F.2d 1145, 1147 [prepayment penalties]; *Rettig v. Arlington Hts. Fed. Sav. & Loan Ass'n* (N.D.Ill. 1975) 405 F.Supp. 819, 823 [fiduciary obligations of directors and officers]; *City Federal Savings & Loan Ass'n v. Crowley* (E.D.Wisc. 1975) 393 F.Supp. 644, 655 [fees received by directors and officers]; *Kaski v. First Fed. S & L Ass'n of Madison* (1976) 72 Wis.2d 132 [240 N.W.2d 367] [interest rate escalation]; *Sears v. First Federal Savings and L. Ass'n of Chicago* (1971) 1 Ill.App. 3d 621 [275 N.E.2d 300] [trust accounts for taxes and insurance]; see also *Derenco, Inc. v. Benj. Franklin Fed. Sav. & Loan Ass'n* (1978) 281 Ore. 533 [577 P.2d 477], cert. den. 439 U.S. 1051 [58 L.Ed.2d 712, 99 S.Ct. 733].)

Although that general proposition reflects a correct statement of law, we are not persuaded that existing state law pertaining to the exercise of due-on-sale clauses in any way infringes upon or is otherwise incompatible with the regulation or operation of the internal affairs of federal saving and loan associations. (See *Holiday Acres v. Midwest Fed. Sav. & Loan Ass'n* (April 3, 1981, No. 338) ..... Minn. ..... [..... N.W.2d .....].) The federal regulation merely authorizes and does not compel savings and loan associations to include a due-on-sale clause in their loan contracts and to exercise their rights thereunder. (*Id.*, at pp. .....)* As noted, California law imposes a more stringent requirement enforcing a due-on-sale clause only upon a showing that the lender's security will be either impaired or subjected to risk of default as a consequence of the transfer. But the federal loan association is not faced with physical impossibility in complying with the two regulatory schemes. Instead, the federal regulation leaves the rights and remedies of the parties intact under the terms of the loan contract. Thus, enforcement of the due-on-sale clause rests upon conventional contract and property principles under state law. (*Id.*, at p. .....)* There is no "inevitable collision" between the two regulations. (*Florida Avocado Growers v. Paul, supra,* 373 U.S. at p. 143 [10 L.Ed.2d at p. 257].)

The Federal Home Loan Mortgage Corporation (FHLMC) appearing as amicus curiae, urges a finding of federal preemption based on a claim of need for national uniformity of loan practices and instruments.† In response,

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*Typed opinion pages 14-15.

*Typed opinion page 10.

†Briefly stated, the argument is made that due-on-sale clauses, by keeping the life of a mortgage relatively short, increase the lenders' yield and thereby promote the national interest by keeping overall interest rates down. Further, by providing a higher yield and a rapid return of capital to the lenders, due-on-sale clauses render the

we rely upon the persuasive language of the Minnesota Supreme Court: "If this national interest were indeed an important policy, it seems that the inclusion of such clauses would be mandated rather than permitted." (*Holiday Acres v. Midwest Fed. Sav. & Loan Ass'n, supra,* ..... N.W.2d at p. .....)† Nor, we think, would application of state law to the exercise of due-on-sale clauses interfere with the federal objectives embodied in the Home Owners' Loan Act. That legislation was enacted during a period of severe economic depression in order to assist financially distressed homeowners. It would be "unreasonable, and ironic, to hold now that the Congress intended [the act] to justify the removal of homeowners' protections under state law." (*Id.*, at p. .....)‡

Our conclusion finds further support in the particular provisions of the deed of trust employed herein. The form of instrument is apparently one promulgated by the FHLMC itself; its use is a precondition to purchase of the mortgage by FHLMC. The trust instrument contains so-called "uniform" and "nonuniform" covenants. The uniform covenants are intended for nationwide use while the nonuniform covenants are tailored to particular state mortgage requirements.[8] For example, the "nonuniform" cov-

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loans marketable in the secondary mortgage market, thereby attracting new funds to the mortgage market and, in turn, again keeping interest rates down. FHLMC, as purchaser of conventional mortgages, will purchase only those mortgages using the standardized FHLMC/FNMA loan instrument employed here.

†Typed opinion page 15.

‡Typed opinion page 17.

[8]Paragraph 15 of the deed of trust provides: "This form deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this

enants employed herein include California statutory requirements regarding notice (Civ. Code, § 2924(b)), reinstatement (Civ. Code, § 2924(c)) and the furnishing of a statement of obligation (Civ. Code, § 2943).

Included in the "uniform" covenants found in paragraph 15 is the express proviso that: *"This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located.* In the event that any provision or clause of this Deed of Trust or Note conflicts with applicable law, such conflict shall not affect other provisions. . . ." (Italics added.) We believe such language expresses an unmistakable intention that state law shall govern the interpretation, validity and enforcement of the loan-security instrument.

Waiver

Notwithstanding the relevant federal regulation, federal savings and loan associations are authorized to waive their rights under the due-on-sale clause.[9] Thus, it has been held that where a federal agency contracts with a private individual and the contract provides that state law governs the contract, state law will apply even in the face of general federal preemption. (*United States v. Stewart* (9th Cir.

Deed of Trust or Note conflicts with applicable law, such conflict shall not affect other provisions. . . ."

[9]Under the Board's statement of policy, savings and loan associations are empowered to waive their rights under the due-on-sale clause: "The Board believes there may be (in addition to the circumstance prescribed in § 545.8-3(g) in which exercise of a due-on-sale clause is prohibited) situations in which it will be appropriate for a Federal association to waive its contractural right to accelerate a loan. Those situations include transfer of title to members of the borrower's immediate family, including a former spouse in connection with a divorce, who occupy or will occupy the property (to the extent not covered by § 545.8-3(g)). Associations also should consider waiving, in cases of extreme hardship to the existing borrower, any right to require an increase in interest rate under a due-on-sale clause." (12 C.F.R. § 556.9(c).)

1975) 523 F.2d 1070 [California's antideficiency judgment statute controls where trust deed provided for interpretation under California law]; see *United States v. Yazell* (1966) 382 U.S. 341, 353 [15 L.Ed.2d 404, 410-411, 86 S.Ct. 500].) Since the subject deed of trust contains a similar provision invoking the "law of the jurisdiction in which the property is situated" in construing that instrument, we conclude that Pan American Federal Savings and Loan Association has effectively waived any claim of federal preemption.

In conclusion, we hold that California law is not preempted by virtue of the relevant federal regulation. Therefore, we reverse the judgment and remand for further proceedings consistent with the views expressed herein.

Elkington, J., and Grodin, J., concurred.

[Civ. No. 47918. First Dist., Div. One. June 29, 1981.]

Stanley E. Panko et al., Plaintiffs and Appellants, v. Pan American Federal Savings and Loan Association et al., Defendants and Respondents.

[Modification* of opinion (119 Cal.App.3d 916; — Cal. Rptr. —) on denial of petition for rehearing.]

THE COURT.—It is ordered that the opinion filed herein on June 1, 1981, be modified in the following particulars:

1. At the end of the last paragraph on page 2 [119 Cal. App.3d 916, 919, advance report, 2d full par., line 9], add as footnote 2, the following: "[2]We are advised that during the pendency of this appeal, Pan American has converted to a state-chartered savings and loan association. Since at the time of the events below Pan American was federally chartered, the central issue is not subject to a claim of mootness."

The addition of this footnote will cause all subsequent footnotes to be renumbered sequentially.

2. On page 2, line 2 of footnote 1[119 Cal.App.3d 916, 919, advance report, fn. 1, line 3], after "1977" add the following: ", as a loan condition imposed by Pan American." Delete the last sentence of footnote 1 on page 2 [119 Cal.App.3d 916, 919, advance report, fn. 1, lines 4-6], beginning "Thus," and ending with "the property."

3. On page 7, at the beginning of line 1, [119 Cal.App. 3d 916, 922, advance report, line 2], after "230" add "; see *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 93-94 [160 Cal.Rptr. 733, 603 P.2d 1329].)"

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*This modification requires movement of text affecting pages 919-920 and 922-926 of the bound volume report.

4. On page 7, line 3 of footnote 5 [119 Cal.App.3d 916, 922, advance report, fn. 5, line 3], delete the comma and the word "but" and add "; however, associations which were formerly state-chartered banks" are not exempt.

5. On page 9, the last complete sentence, [119 Cal.App. 3d 916, 923, advance report, 2d full par., line 6], add as footnote 8, the following: "'Although the Minnesota Supreme Court declined to extend a state statute governing residential property to commercial property, we find that court's holding on the separate question of preemption to be no less persuasive."

The addition of this footnote will change former footnote 7 on page 10 [119 Cal.App.3d 916, 924, advance report] to footnote 9.

Respondents' petition for rehearing is denied.

Appellant's Reply Brief

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No. 81-922

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,
Appellants,

vs.

STANLEY E. PANKO, and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

ROBERT ALLEN SELIGSON
300 Montgomery Street
Suite 821
San Francisco, CA 94104
Telephone: (415) 788-4844
Attorney for Appellants

ELLEN LAKE
100 Bush Street, Suite 1450
San Francisco, CA 94104
Of Counsel

BOWNE-PERRAU WALSH • 190 NINTH ST. • S.F., CA 94 03 • (415) 864-2300

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No. 81-922

In the Supreme Court

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OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,
Appellants,

VS.

STANLEY E. PANKO, and GEORGE L. SINCLAIR,
Appellees.

On Appeal from the California Court of Appeal, First Appellate District

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

I. THE DECISION BELOW IS A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257.

The major issue presented by this appeal is whether a federal savings and loan association may exercise a due-on-sale clause authorized by the Federal Home Loan Bank Board and included in the instant deed of trust, in the face of contrary state law.[1] The California decision on that point constitutes a final judgment for purposes of 28 U.S.C. § 1257, even though the court below reversed the grant of summary judgment and remanded for further proceedings.

In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court outlined four categories of cases in which the final judgment requirement is deemed satisfied, permitting immediate review of a federal issue despite further state proceedings. This case falls within *Cox* category one or four. Here the federal issue is conclusive and the outcome of further proceedings is preordained. But even if, as appellees contend, there are possible state law defenses on which Pan American could theoretically prevail, any such defenses are entirely separate, would raise no further federal questions, and the preemption issue is so important that a refusal to immediately review the lower court decision will "seriously erode federal policy." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 483)

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[1]Appellees' repeated reference to appellants' conversion to a state charter has nothing to do with the issues in this case. The contract between the parties was entered into while Pan American was a Federal association. The Karps sold the property to appellees while Pan American was a Federal association. Pan American took action to enforce its rights while it was a Federal association. The court below expressly ruled:

> "Since at the time of the events below Pan American was federally chartered, the central issue is not subject to a claim of mootness." (Jurisdictional Statement, Appendix at A-12)

Additional proceedings herein will not require the decision of other federal questions that might require review by this Court at a later date. Immediate rather than delayed review is the best way to avoid the mischief of economic waste and delayed justice. The federal issue will not be mooted or otherwise affected by the proceedings yet to be heard, either because these proceedings have little substance, their outcome is certain or they are wholly unrelated to the federal question. Finally, a refusal to immediately review the California court decision will seriously undermine the Federal policy enunciated by the Federal Home Loan Bank Board. The instant case poses a question of nationwide importance which is crucial to the continued solvency of the federal savings and loan industry and to the availability of residential financing capital.[2] Immediate review should be granted.

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[2]In 1975, well before the current crisis faced by thrift associations, the Bank Board reviewed a wide array of economic data and reports and conducted its own intensive study of the economic impact of due-on-sale clauses. Based on this in-depth review, the Board issued a lengthy advisory opinion which concluded:

> "There are valid and compelling economic and marketing considerations underlying the use and exercise of 'due on sale' clauses.
>
> The 'due on sale' clause is vital and necessary to enable savings and loan associations to adjust their loan portfolios towards current market rates, thereby protecting the associations' financial stability, and enabling them to make new home loans at lower interest rates than otherwise would be necessary to maintain an adequate yield on their mortgage portfolios.
>
> The 'due on sale' clause enables savings and loan associations to sell their existing home loans in the secondary mortgage market in an orderly manner, thereby generating new funds for additional residential loans, which otherwise would be unavailable.
>
> Elimination of the 'due on sale' clause is likely to cause higher interest rates on home loans generally, and a reduction of home loan funds.

II. INTERPRETATION OF THE INSTANT UNIFORM DEED OF TRUST IS A QUESTION OF FEDERAL LAW.

Appellees' claim that the court below was simply interpreting a contract under California law ignores the federal context of this transaction.

The instant deed of trust is a standardized loan instrument drafted by the Federal Home Loan Mortgage Corporation (FHLMC) and the Federal National Mortgage Association (FNMA), two federal instrumentalities. This standardized instrument was prepared pursuant to Congressional mandate, arising from the Emergency Home Finance Act of 1970, 12 U.S.C., § 1451, to develop a uniform loan instrument to facilitate the acceptability of home mortgages as an investment in the newly-created national secondary mortgage market.

According to the drafters of the standardized instrument, the purpose of Uniform Covenant 15 was to state a choice-of-law rule *between competing state laws in those areas not regulated by the Federal Home Loan Bank*

Elimination of the 'due on sale' clause will benefit only a limited number of home sellers, but will cause economic hardship to the majority of home buyers and potential home buyers.

Elimination of the 'due on sale' clause will have a much more adverse affect on Federal associations than on State associations in California, and could alter competitive equality between Federal and State associations in that State.

The exercise of the 'due on sale' clause on the facts of this case, or generally, does not constitute an unreasonable restraint on alienation."

Advisory Opinion of the Federal Home Loan Bank Board, Resolution No. 75-847. *In the Matter of Eric M. Schott v. Mission Federal Savings &Loan Association*, See Jurisdictional Statement, *California Federal Savings and Loan Ass'n v. Tan*, No. 81-993, Appendix A-38, A-80-81.

Board, such as homestead rights, dower, and descent in distribution of intestate property. (See opinion of FHLMC General Counsel, Henry Judy, Appendix at A-1.) It was not intended to express a preference for state law over federal law, for the drafters were well aware of the established precedent concerning the preemptory effect of HOLA and Bank Board regulations, as well as the principle that state law necessarily includes federal law. It simply would have made no sense for two federal instrumentalities mandated to produce a standardized loan instrument for national use to have included a "choice-of-law" clause requiring interpretation of that uniform instrument according to the differing laws of the 50 states. The drafters of Uniform Covenant 15 did not so intend and their intention is entitled to deference. See *E.I. Du Pont de Nemours and Co. v. Collins,* 432 U.S. 46, 54-55. (1977); cf. *Udall v. Tallman,* 380 U.S. 1 (1965).

Moreover, it is a basic rule of contract interpretation that a specific provision will control over a more general one. While Uniform Covenant 15 refers generally to "the law of the jurisdiction in which the property is located," Uniform Covenant 17 specifically permits the lender to accelerate the loan upon sale of the secured property. Uniform Covenant 15 cannot have been intended to waive rights specifically granted in Uniform Covenant 17.

At bottom, this case involves a federally-chartered lender, operating under a pervasive scheme of federal regulations and contracting by use of a federally-drafted, standardized instrument intended to advance specific federal interests in uniformity. Under these circumstances, the question whether the federal association intended to waive federal rights must be resolved according to federal law, applying a uniform federal rule. (*Clearfield Trust Company v.*

United States, 318 U.S. 363 (1943))[3] Appellees' buzzword refrain that this case affects real property interests, traditionally matters of local concern, simply evades these fundamental issues.[4]

III. THE HOME OWNERS' LOAN ACT AND THE BANK BOARD'S DUE-ON-SALE REGULATIONS PREEMPT CALIFORNIA LAW.

A. Federal Law Occupies the Field.

Appellees' failure to recognize the preemptive effect of federal law rests in part on their distorted view of the historical context in which HOLA was enacted. *Conference of Federal Savings and Loan Associations v. Stein*, 604 F. 2d 1256, 1257-8 (9th Cir. 1979), aff'd. 445 U.S. 921 (1980), sets the record straight:

> "The Home Owners' Loan Act of 1933, 12 U.S.C. § 1461 et seq. (HOLA), was the result of *congressional dissatisfaction with state law and practice* in the fi-

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[3] *United States v. Yazell*, 382 U.S. 341 (1966), cited by appellees, involved a "custom-made, handtailored, specifically negotiated transaction . . . not a nationwide act of the Federal Government, emanating in a single form from a single source." (382 U.S. 341 at 349)

[4] Contrary to the impression which appellees seek to convey, the Bank Board regulations do not interfere with a long-standing state policy. The Board's regulations were adopted in 1976. The instant loan contract, with its due-on-sale clause, was entered into in November 1977. The property was sold in June 1978. Pan American demanded full payment of the loan balance in July 1978; and when the Karps failed to pay off the loan, it recorded a notice of default on August 18, 1978. It was not until after all these events had occurred that the California Supreme Court filed its decision in *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 148 Cal. Rptr. 379, on August 25, 1978. Thus, this case presents a clear case of state law directly conflicting with pre-existing federal law [which occupied the field] and frustrating the full effectiveness of that [federal] law.

> nancing of home construction. The first federal effort was through the Home Loan Bank Act of 1932. This failed to attack the problem satisfactorily. By 1933, 40 per cent of all home loans in the United States were in default. . . .
>
> "The result was HOLA, a radical and comprehensive response to the inadequacies of the existing state systems. *A federal savings and loan system was created.* The Federal Home Bank Board (The Bank Board) was created with extremely broad powers to promulgate rules and regulations."

Based on this legislative history, the "extremely broad powers" granted to the Bank Board and the extensive regulations by the Board since it was created, courts have generally found that "the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control." (See, e.g., *Conference of Federal Savings and Loan Associations v. Stein*, 604 F. 2d at 1260; accord, *Meyers v. Beverly Hills Federal Savings & Loan Association*, 499 F. 2d 1145 (9th Cir. 1974))

There is nothing in HOLA which limits the Bank Board's regulatory authority to the "internal" affairs of federally-chartered associations. There is nothing in HOLA which leaves regulation of "external" affairs to the states. The statute itself makes no such distinction when it mandates the Bank Board "under such rules and regulations as it may prescribe, to provide for the . . . operation and regulation of associations to be known as Federal Savings and Loan Associations. . . ." (12 U.S.C. § 1464(a)(1)) HOLA gives broad powers to the Board to issue regulations prescribing the "best practices," for the "operation" of federal associations. Federal and state courts have rejected any such distinction in holding that the Board, not the states,

is empowered to regulate the mortgage lending practices of federal associations. (See e.g., *First Federal Savings & Loan Association of Boston v. Greenwald*, 591 F. 2d 417 (1st Cir. 1979) (payment of interest on escrow accounts); *Meyers v. Beverly Hills Federal Savings & Loan Association, supra*, 499 F. 2d 1145 (prepayment penalties); *Kaski v. First Federal Savings & Loan Association of Madison*, 72 Wis. 2d 132, 240 N.W. 2d 367 (prepayment penalties))

Gulf Federal Savings & Loan Association of Jefferson Parish v. Federal Home Loan Bank Board, 651 F. 2d 259 (5th Cir. 1981), does not hold differently. In that case, the Fifth Circuit reversed a Bank Board cease and desist order against Gulf Federal, finding that the association's alleged misconduct did not violate *any* law, federal or state, and that the Bank Board's cease and desist power was statutorily limited to activities that threaten an association's financial condition, which was not the case there. The court's fleeting reference to a distinction between the "internal management" of federal associations and the particular loan contract at issue was dictum limited to the facts of that case.

Pursuant to very broad authority granted by Congress, the Bank Board has issued extensive regulations governing the mortgage lending practices of federally-chartered associations. These regulations occupy the field and preclude state regulation.

B. California Law Conflicts With the Bank Board's Regulations.

Appellees have abandoned any defense of the California court's unprecedented holding that a duly authorized federal regulation cannot preempt conflicting state law. Instead, they argue that there is no conflict here since the Bank Board's due-on-sale regulations are permissive, not

mandatory. They argue that Federal savings and loan associations are free to give up their right to enforce their federally-authorized due-on-sale clauses, and thereby sidestep any clash with California law. In essence, appellees' argument boils down to the proposition that whenever a federal agency permits—but does not require—a particular practice, the states may ban it.

The direct answer to appellees' position is that it is supported by neither logic nor precedent and is flatly contrary to several cases decided by this Court just last term. In *Alessi v. Raybestos-Manhattan, Inc.*, ... *U.S.* ....., 68 L. Ed. 2d 402 (1981), this Court invalidated a New Jersey statute that effectively prohibited one method of pension calculation that was permitted, but not mandated, by a Treasury regulation issued under ERISA. In *Chicago and North Western Transportation Company v. Kalo Brick and Tile Co.*, ... U.S. ....., 67 L. Ed. 2d 258 (1981), this Court held that no state court action for damages would lie against a railroad for abandoning a line after the Interstate Commerce Commission had approved, but not required, the railroad's abandonment petition.

The basic standard for determining the existence of a federal-state conflict for preemption purposes is not whether the federally-chartered institution may forego its rights under federal law and thereby prevent a collision with state law, but whether the state provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *McCarty v. McCarty*,

..... U.S. ....., 69 L. Ed. 2d 589 (1980).[8] That test is clearly met here.

Contrary to appellees' assertion, there is an "actual, present, and irreconcilable" conflict involved herein. Under the decision of the lower court, it is not possible for federal associations to exercise the rights granted to them under federal law. California law stands as an obstacle to the full enforcement of federal law and is preempted.

CONCLUSION

HOLA was enacted by Congress during the Depression to provide a strong and healthy thrift industry. At a time when the financial stability of thrift institutions across the country is in peril, it is imperative that federal associations be governed by the "best practices" determined to be in the public interest by the agency empowered by Congress to regulate such associations.

Appellees' claim that federal associations seek an improper advantage over their state-chartered competitors ignores two very important factors—HOLA and the United States Constitution. If enforcement of a due-on-sale clause strengthens a federal association's financial status, compared with its state-chartered neighbor, that is precisely what Congress intended when it directed the Bank Board to implement the "best practices" of home financing institutions on a nationwide basis.

Operating under a very broad mandate granted by Congress, the Bank Board has issued comprehensive regula-

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[8] *McCarty* makes clear that a state law which obstructs federal objectives will be preempted even in a sphere traditionally subject to state regulation. In *McCarty* this Court held that California community property law "has the potential to frustrate each of [the] objectives" of the federal military retirement system and was therefore preempted. (69 L. Ed. 2d at 608.)

tions governing the mortgage lending practices of federal savings and loan associations. Its careful and definitive finding that enforcement of due-on-sale clauses is necessary to the continued solvency of federal associations is entitled to great respect. Failure to give the Bank Board's regulations preemptive effect against contrary state law will condemn this nation to repeat the mistakes that led to the enactment of HOLA nearly fifty years ago. The motion to dismiss or affirm should be denied. Appellants respectfully urge this Court to note probable jurisdiction and to reverse the decision of the California Court of Appeal.

Dated: December 28, 1981.

Respectfully submitted,

ROBERT ALLEN SELIGSON
Attorney for Appellants

ELLEN LAKE
Of Counsel

Appendix

Appendix

Federal Home Loan Mortgage Corporation

[Letterhead]

Henry L. Judy
Vice President
General Counsel

May 24, 1978

Anne P. Jones, Esquire
General Counsel
Federal Home Loan Bank Board
1700 G Street, NW
Washington, D.C. 20552

Dear Ms. Jones:

This letter is in response to your request for my opinion on the meaning and effect of the choice of law provision contained in Uniform Covenant 15 of the FNMA/FHLMC Single-Family Mortgage Instruments, particularly as that provision affects the inter-relationship of federal and state law. Uniform Covenant 15, which is found in each state home mortgage instrument, provides:

> "This form of mortgage combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Mortgage shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Mortgage and the Note are declared to be severable."

This letter will analyze the meaning of Uniform Covenant 15 in terms of the history of its drafting, the effect of federal supremacy and the intent of the parties reflected by the mortgage.

The Drafting History:

Initially, I believe a brief explanation of the history of the uniform mortgage instruments would be helpful. When the Emergency Home Finance Act of 1970, 12 U.S.C. § 1451, created The Mortgage Corporation ("FHLMC") and authorized the Federal National Mortgage Association ("FNMA") to purchase conventional home mortgages, FHLMC and FNMA undertook jointly to prepare their own conventional mortgage documents. The Congressional hearings which led to the federal sponsorship of a secondary market for conventional mortgages had emphasized the need to standardize the terms of home mortgages in order to facilitate their acceptability as investments in a national market. Accordingly, the two Corporations endeavored to prepare forms that would provide a maximum degree of national uniformity.

We felt our forms would benefit from a standard choice of law provision to help reach our goal of maximum substantive uniformity. The choice of law sentence was included in Uniform Covenant 15 to state a rule of choice for potentially competing state laws; issues of this type were anticipated, and these could not always be resolved by drafting. The choice of law sentence in Uniform Covenant 15 of the mortgage was not intended to state a choice of state as opposed to federal law.

In fact, we understood that federal law was generally applicable to a loan originated on the FNMA/FHLMC forms if the lender was a federally chartered institution and that this was mandated by the federal law itself. Pur-

suant to the Congressionally delegated authority to "make policy", the Federal Home Loan Bank Board has promulgated "comprehensive" regulations which, the courts have uniformly and consistently held, govern every aspect of the operations of every federal savings and loan association from its birth to its death. *People v. Coast Federal Savings & Loan Association, supra*, 98 F. Supp. 311 (S.D. Cal. 1951); *Kupiec v. Republic Federal Savings & Loan Association*, 512 F. 2d 147, 150 (7th Cir. 1975). As you know, the rationale of the *Coast Federal* case was adopted by the Ninth circuit in *Meyers v. Beverly Hills Federal Savings & Loan Association*, 499 F. 2d 1145 (9th Cir. 1974). At issue in *Meyers* was whether a Board regulation on the terms of mortgage loans made by federal associations so occupied the field as to exempt federal associations in California from state law dealing with prepayment penalties. The Ninth Circut held flatly and unequivocally that in an area regulated by the Board "federal law preempts the field" so that "any California law in the area is inapplicable to federal savings and loan associations operating within California" (499 F. 2d at 1147).

However, even lenders governed by federal law may be concerned about specifying a choice between potentially applicable state laws because governing federal law may require compliance with state rules. An example of the need to choose among competing state laws can be seen in a current example involving home mortgage transactions which arguably are subject to the law of two states. Today certain Maryland lenders, even those which are federally chartered, lending to Virginia residents on Virginia property could be said to be required to pay interest on a mortgage escrow account maintained in connection with that loan because of a Maryland statute requiring interest to be paid on escrow accounts. State lenders are directly subject to this law; federally chartered associations must comply

with this particular state law pursuant to FHLBB Reg. § 545.6-11(c). (This requires federally chartered associations to pay interest on escrow accounts if state chartered lenders must, although not necessarily at the rate required by state law.) I understand that Maryland lenders, state and federal), using the FNMA/FHLMC Mortgage have taken the position that Maryland law does not apply to such loans, in part because of the Uniform Covenant 15 choice of law provision.

Another example of the need for Uniform Covenant 15 in order to choose among competing state laws arises under the Uniform Probate Code. The general common law rules is that the rights of survivors in a decedent's real property situated in a state other than the state of the decedent's domicile are to be determined in accordance with the law of the jurisdiction in which the realty is situated. However, the Uniform Probate Code overrules this common law principle and provides that the law of the decedent's domicile governs a surviving spouse's rights in real property located in another state. The effect of this may be that a waiver of dower, which would be enforceable in the jurisdiction in which the property is located and the mortgage is taken, would be unenforceable because of the application of the law of the decedent's domiciliary state. Uniform Covenant 15's choice of law provision should preserve the enforceability of the dower waiver by directing the domiciliary state court to apply the law of the state in which the property is located and thereby uphold the waiver.

Lenders, consumers, and their lawyers who commented in 1970 and 1971 on the exposure draft version of the mortgage instruments circulated nationally by FNMA and FHLMC understood that the purpose of Uniform Covenant 15 was to choose among competing state laws. Most persons commenting on the substance of the choice of law provision in Uniform Covenant 15 focused on the fact that

the provision referred only to the "Mortgage" and not to both the "Mortgage" and the "Note". None of the commentators suggested that the clause in any way went beyond stating a choice between competing state laws.

Federal Supremacy:

I would like to make some observations about the effect of Uniform Covenant 15 with regard to the litigation involving the enforceability of due-on-sale clauses under the state law and the federal preemption issue. State law necessarily includes federal law to the extent to which the federal Constitution provides for federal supremacy and the federal government has acted within its authority. Thus, a provision which states that the law governing the contract is "the law of the jurisdiction in which the property is located" does not exclude federal law. Federal law necessarily is a part of the law of that jurisdiction.

For this reason, a choice of law provision such as Uniform Covenant 15 provides no basis to find an intent on the part of the contracting parties to choose between state and federal law or to disavow the application of any federal law or regulation that might apply to that contract.

The Intent of the Parties:

I believe that consideration of the parties' contractual intent is important because of the substance of the Board's regulation on "due-on-sale" clauses such as Uniform Covenant 17 of the FNMA/FHLMC Mortgage. As you know, the Federal Home Loan Bank Board's due-on-sale regulation does not require federally chartered savings and loan associations to obtain the right to accelerate on sale. Rather, the regulation states that if a federal association does contract for this right, the contract provision shall be enforceable. Therefore, the question that would arise if the choice of law provision in Uniform Covenant 15 were

deemed relevant in a dispute over the enforceability of Uniform Covenant 17 would be whether the parties to the mortgage intended to disavow the application of the sanctioning federal regulation. That question must be answered from the specifics on the contract.

For the reason I have just suggested, I do not believe it is possible to infer such an intent on the basis of the choice of law sentence in Covenant 15. To the contrary, it seems to me that the sentence states no choice at all as between federal and state law. Therefore, if there is a question as to whether the parties contracted for a due-on-sale provision, other provisions of the contract must be examined. Such an examination reveals that the FNMA/FHLMC Mortgage contains an express provision on this point which establishes the parties' intent to create an enforceable due-on-sale provision. This is reflected in Uniform Covenant 17 (which, in the case of California, is repeated in the Note as well).

It is a basic rule of contract interpretation that a specific provision will control over a more general provision. *Restatement, Contracts,* § 236(c); *Corbin on Contracts* One Volume Edition §§ 545-554; 17 Am. Jur. 2d *Contracts* § 270. This concept is reflected in the *Restatement Second, Conflict of Laws* by the rule that a choice of law provision will not be applied to invalidate a term of contract which would be valid under other applicable law. *Restatement Second, Conflict of Laws* § 187, Comment (e); accord; *Kossick v. United Fruit Co.,* 365 U.S. 731, 741 (1961); *Pritchard v. Norton,* 106 U.S. 124, 137 (1882). Thus, given the express contractual provision of Uniform Covenant 17, conferring the right to accelerate on sale, it is most implausible to argue that the parties did not intend this provision to be an enforceable term of their contract.

Conclusion:

Based on the foregoing, it is my conclusion that neither the drafting history of the FNMA/FHLMC forms, the relationship of federal and state law nor the intent of the parties to the loan can reasonably be understood to state a choice between federal and state law. Federal law preempts state law for federally chartered associations unless state law is chosen by the federal rule, and nothing in Uniform Covenant 15 changes this. Moreover, a court seeking to give effect to the choice of law sentence must consider applicable federal law as a part of the law of the jurisdiction in which the mortgaged property is located. If, for example, federal law expressly gives the parties to the mortgage an option to choose a particular term of the mortgage, state law on the enforceability of that term provision is, for loans governed by federal law, immaterial. The only question would be whether the parties had exercised their option under federal law. That question must be answered by the specifics of the contract, *e.g.* whether their contract contains the provision and whether the provision is in a form which complies with the federal regulations. If these tests are met, such an express term of the contract should not be invalidated on the basis of an implication sought to be drawn from a general provision of the contract.

If I can provide further information or assistance to you, I will be pleased to do so.

Sincerely,

/s/ HENRY L. JUDY
Henry L. Judy

HLJ:kms
cc: James E. Murray,
Senior Vice President and General Counsel,
Federal National Mortgage Association

Amicus Brief

81-922

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

PAN AMERICAN SAVINGS AND LOAN ASSOCIATION (formerly Pan American Federal Savings and Loan Association) and PAN AMERICAN SERVICE COMPANY,

Appellants,

VS.

STANLEY E. PANKO and GEORGE L. SINCLAIR,

Appellees.

On Appeal from the California Court of Appeal, First Appellate District.

AMICUS CURIAE BRIEF OF THE SECRETARY OF THE BUSINESS, TRANSPORTATION AND HOUSING AGENCY OF THE STATE OF CALIFORNIA IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM

GEORGE DEUKMEJIAN, Attorney General
ARTHUR C. DE GOEDE,
Assistant Attorney General
JOSEPH M. O'HERON,
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2339

RICHARD M. MOSK
W. GARY KURTZ

Attorneys for Amicus Curiae
The Secretary of the Business, Transportation and Housing Agency of the State of California

PANDICK PRESS, WEST COAST, 1945 S. FIGUEROA, LOS ANGELES, CALIFORNIA (213) 747-4321

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Appellees.

On Appeal from the California Court of Appeal, First Appellant District.

AMICUS CURIAE BRIEF OF THE SECRETARY OF THE BUSINESS, TRANSPORTATION AND HOUSING AGENCY OF THE STATE OF CALIFORNIA IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM

I. INTEREST OF THE *AMICUS CURIAE.*

The Secretary of the Business, Transportation and Housing Agency of the State of California ("Secretary" or "*Amicus*") files this *Amicus Curiae* brief in support of the Motion to Dismiss or Affirm the Judgment of the California Court of Appeal.

The Secretary has in this and other related cases opposed the notion that lending institutions making loans in California, secured by California real estate and utilizing California corporations as trustees, are somehow immune from state real property and debtor protection laws, just because the institution happens to have a federal charter.

The Secretary is particularly concerned with the adverse effects that preemption would have on California. First, it is basically unfair because borrowers have not known that they would have fewer rights when they borrowed from a federally chartered association rather than from a state association. Second, state associations are converting to federal associations simply to escape the application of state laws, thus jeopardizing California's role with respect to financial institutions in this state. Third, federally chartered associations should not have an advantage over state chartered associations, especially in view of the fact that state law expressly grants to federal associations "all the rights, powers, and privileges . . . [and] exemptions and immunities" granted to state chartered associations. Cal. Fin. Code § 11000. Fourth, if federally chartered associations are immune from the state laws involved in this case, then they may be immune from other state laws relating to their lending activities and perhaps from other state laws such as zoning, health and safety and even criminal laws.[1] Fifth, the Federal Home Loan Bank Board ("Board") a non-elected federal administrative agency should not be able to cause unpredictability and confusion by suddenly purporting to nullify historic state real property and contract laws. Sixth, federally chartered associations should not be able to take advantage of certain state laws concerning their real property

[1] There are many state laws which unquestionably apply to federally chartered institutions. These would include health, safety and wage laws, as well as various real property laws (e.g. antideficiency laws). These laws apply to all employers and institutions doing business in California, including those that are federally-chartered. These laws do not "regulate" the federal associations.

transactions and even provide in their lending instruments for the application of state laws, while avoiding the application of some state laws.

For all of the foregoing reasons, the Secretary has an interest in the subject matter of this action.

II. SUMMARY OF ARGUMENT.

California federally chartered savings and loan associations make loans in California secured by California real estate and utilize California trustees, California law and California procedure. Accordingly, those associations should not be immune from the application of historic California real property law dealing with the transfer of real property in California—in this case the prohibition of restraints on alienation, which prohibition equitably restricts the enforcement of the due-on-sale clause in a deed of trust. The legislative history and the application of the Federal Home Owner's Loan Act of 1933 (Title 12 U.S.C. § 1461 *et seq.*) ("HOLA") demonstrates that Congress never intended such preemption. There is no conflict between state and federal law. Regulations of the Board simply authorize the use of the due-on-sale clause. California allows its use also but restricts its enforcement in certain cases. Authorization for use of a due-on-sale clause by a Board regulation does not result in preemption. The Board has not and cannot by resolution or regulation preempt historic state real property law when such preemption is not provided for or authorized by Congress.

The federally chartered associations have provided in their lending documents for the application of California law. Accordingly, they have waived whatever rights they may have by virtue of the preemption doctrine.

California appellate courts have held that California laws relating to restraints of alienation apply to federal associations. This issue can generally only be resolved by state courts since

there is no federal jurisdiction over a claim just becuase there is a defense of federal preemption. This case arose by way of a summary judgment without any factual showing of the operation of federal and state laws. There are recent laws granting federal savings and loan associations many devices to update their loan portfolios, and there is now proposed federal legislation to expressly override state law. Thus, this case does not present a substantial federal question.

III. ARGUMENT.

A. FEDERALLY CHARTERED ASSOCIATIONS SHOULD NOT BE IMMUNE FROM STATE LAWS CONCERNING REAL PROPERTY TRANSACTIONS BETWEEN THE ASSOCIATIONS AND OTHERS.

(i) FACTS.

California has, by statute enacted the ancient common law restrictions on restraints on alienation of real property. Calif. Civil Code § 711; *see* 6 Powell on Real Property 2 (1979); Comment, *Coast Bank v. Minderhout and the Reasonable Restraint on Alienation: Creature of Commercial Ambiguity,* 12 UCLA L. Rev. 954, 955-56 (1965).

The California Supreme Court has held that enforcement of a due-on-encumbrance clause or a due-on-sale clause is an unreasonable restraint on alienation when not necessary to protect the lender's security, and that such enforcement violates common and statutory law. *La Sala v. American Sav. & Loan Assn.,* 5 Cal.3d 864 (971); *Tucker v. Lassen Sav. & Loan Assn.,* 12 Cal.3d 629 (1974); *Wellenkamp v. Bank of America,* 21 Cal.3d 943 (1978). *See also Brown v. Avemco Investment Corp.,* 603 F.2d 1367 (9th Cir. 1979).

Federally-chartered savings and loans generally do business only in one state, and, thus, are not subject to conflicting state regulations.[2]

In California, the deeds of trust of the federal associations are recorded pursuant to California law. These recorded deeds of trust generally refer to a fictitious deed of trust recorded by a California corporation as trustee. That recording and the incorporation by reference of the fictitious deed are accomplished under the provisions of California Civil Code § 2952.

In the event of default, the federal association directs the trustee, a California corporation (presumably not subject to the control of the Board) to file a Notice of Default and Election to Sell, a procedure authorized by California Civil Code § 2924b. Accordingly, the actual enforcement of the due-on-sale clause is done by a California corporation—not by the federally chartered association. More importantly, the security in question is California property and generally the parties are California property owners or consumers.

As noted by the court below, the deed of trust often provides for the application of state law. Thus government agencies that purchase the mortgage instruments issue uniform deeds of trust that provide that they "shall be governed by the law of the jurisdiction in which the property is located." See Federal home Loan Mortgage Corp. Seller's Guide, § 1.407 at p. 110.[3] Indeed, the deeds of trust and notes of federal associations often refer to California law.

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[2] 12 C.F.R. 545.8-6 (1980) [and proposed 556.5(a)(3) in 45 F.R. 31121 (May 12, 1980)]. There are a few savings and loans which, by reason of their preexisting status upon conversion have branches outside their home state. There are only ten such "grandfathered" institutions in the United States. Hearing before the House Subcommittee on Financial Institutions in H.R. 3864 p. 163 (96th Cong., 1st Sess. May 15-17, June 12-14, 1979, Serial No. 96-31). Recently, the Board approved a multistate purchase of associations by a federal association. Los Angeles Times, Pt. IV p. 1, Sept. 9, 1981.

[3] That the Federal Home Loan Mortgage Corporation may require lenders who sell instruments to them to use a deed of trust with a due-on-sale clause is irrelevant because California law does not preclude a due-on-sale clause—only its enforcement in certain instances.

When the association or the trustee decides to foreclose by virtue of the enforcement of a due-on-sale clause, it takes advantage of California's non-judicial or judicial foreclsoure laws. *See, e.g.,* Cal. Civ. Code § 2924. In fact, these foreclosure provisions provide that there cannot be foreclosures based on the enforcement of due-on-sale clauses in certain instances. Cal. Civ. Code § 2924.5. California law governs the rights of the parties to the note and the deed of trust. Cal. Civ. Code § 755.

Until July 31, 1976, no regulation of the Federal Home Loan Bank Board authorized the exercise of due-on-sale clauses, or for that matter, placed any limitations on their use. Instead, federal associations routinely resorted to state laws to litigate the enforceability of such clauses against their borrowers. *See infra* at n. 8. In 1976, some 44 years after its creation, the Board suddenly concluded it had the authority to preempt state law dealing with borrowers' rights.

(ii) CONGRESS DID NOT INTEND THAT THERE BE PREEMPTION.

There is not one word in the HOLA, which is the federal statute dealing with federal associations, suggesting preemption, and there is no legislative history indicating such preemption.

The legislative history of HOLA reveals only one purpose for the creation of federally chartered savings and loan associations—to create mortgage lenders in areas where none then existed.[4] Thus the purpose of the federally chartered savings and loans had nothing to do with state regulations or state practices.

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[4] See Report of the House Committee on Banking and Currency (H.R. Rept. No. 55) 73d Cong. 1st Sess., p. 2 (April 25, 1933) (hereinafter "House Committee Rept."); Report of the Senate Committee on Banking Currency (Sen. Rept. No. 91) 73d Cong. 1st Sess. pp. 2-3 May 15, 1933); Hearings on HOLA Act H.R. 4980, H.R. Comm. on Banking and Currency, April 21, 1933, pp. 14-15 "The bill also provides for the board to charter Federal savings and loan associations in communities now insufficiently served by any institution or other lender on homes, so that provision may be made for the financing of homes in more than 1,500 counties in the United States now having no such facilities." House Committee Rept., p. 2.

That the Board may have exclusive authority with respect to some activities of the federal associations does not mean it has exclusive authority over all areas of regulation touching upon these institutions (e.g., crimes, real property transactions, zoning, consumer protection and contractual relations with third parties). As the Supreme Court stated in *Kelly v. Washington,* 302 U.S. 1, 10 (1937):

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. . . ."

Nothing in HOLA addresses any aspect of the enforceability of federal associations' contracts with third parties. Presumably, if Congress had intended to preempt state contract law, it would have expressly so stated or, at a minimum, addressed the subject of contract law in HOLA. It did neither.

Even assuming Congress had established a pervasive regulatory scheme, that would not result in preemption.

> "We reject, to begin with, the contention that preemption is to be inferred merely from the comprehensive character of the federal . . . [legislative scheme]. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. . . ." *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 415 (1973) (Citations omitted.)

See Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Colum. L. Rev. 623, 654 (1975). *Confederated Tribes, etc. v. State of Wash.,* 519 F.2d 89, 91 (9th Cir. 1979). ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.")

The contemporaneous administrative practice at the time the HOLA was enacted also suggests that Congress did not intend to confer upon the Board the right to preempt state law in the areas in question. The Board was active in chartering savings and loans (T. Marvell, *The Federal Home Loan Bank Board* 115 (1969)), but it was relatively inactive in promulgating regulations. *Id.* at 150. Indeed, the Board did not enact a comprehensive set of regulations. That is why even as to matters involving internal affairs of federal associations, state laws were applied for years, and without any assertion of preemption.[5]

Interestingly, it was not until 1948 that a regulation purported to deal with contracts with third persons, and that was a general provision on loan contracts.[6] It was not until June of 1976, after litigation with the State of California was commenced, that the Board specifically dealt with due-on-sale clauses in regulations.

Moreover, for decades courts have applied state law in determining the contractual rights of federal associations *vis-a-vis* borrowers. Since there is no federal recording statute, federal associations recorded their security instruments with the states, and their rights under these instruments have been determined under state lien priority rules.[7] The loans of

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[5] *See Pearson v. First Federal S. & L. Ass'n*, 149 So.2d 891, 894-896 (Ct. App. Fla. 1963) (validity of proxies); *Ochs v. Washington Heights Fed. S. & L. Ass'n*, 268 N.Y.S.2d 274 (1966) (right to inspect membership list); *In re Election of Directors of Baldinsville Federal S. & L. Ass'n*, 51 N.Y.S.2d 816 (App. Div. 1944) (election of directors).

[6] See 12 C.F.R. 545.6-11 as adopted in 23 Fed. Reg. 9902, December 23, 1958. With slight language changes, the regulation is now contained at 12 C.F.R. 545.8-3(a).

[7] *E.g., First Fed. S. & L. Ass'n v. Ott*, 285 So.2d 5 (Fla. App. 1973), *cert. denied*, 291 So.2d 10 (1974) (constructive notice); *Anatole Caron, Inc. v. Manchester Fed. S. & L.*, 10 A.26 668 (N.H. 1940) (mechanic's lien law); First Fed. S. & L. Ass'n v. Green-Acres Building Corp., 236 N.Y.S.2d 1009 (Cty. Ct. 1963) (priority of lien under future advances clause); *Apex Siding & Roofing Co. v. First Fed. S. & L. Ass'n of Shawnee*, 301 P.2d 352 (Okla. 1956) (equitable estoppel to assert priority).

federal associations have always been enforced in state courts pursuant to state laws.[8] And the rights of federally chartered savings and loans have always been deemed to be limited by state-created rights of borrowers such as the rights of redemption, antideficiency laws and other equitable defenses.[9]

State law has routinely been applied to all types of contractual disputes between borrowers and federal associations,[10] and in some instances the application of state law has resulted in the invalidity or unenforceability of those contracts.[11]

In light of the forty year history of application of state law to federal savings and loan contracts with borrowers and the lack of Board regulation in the area, it is inconceivable that Congress had intended preemption.

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[8] *E.g., Kanakee Fed. S. & L. Ass'n v. Arnove*, 47 N.E.2d 874 (Ct. App. Ill. 1943); *Minnesota Fed. S. & L. v. Central Enterprises of Superior, Inc.*, 247 N.W.2d 46 (Minn. 1976); *Home Fed. S. & L. v. Four Star Heights, Inc.*, 333 N.Y.S.2d 334 (Sup. Ct. 1971); *Benjamin Franklin Fed S. & L. Ass'n v. Almond*, 577 P.2d 937 (Or. 1978).

[9] *E.g., In re Wilton-Maxfield Mgt. Co.*, 117 F.2d 913 (9th Cir. 1941) (anti-deficiency statute). *Caudle v. First Fed. S. & L. of Sylacauga*, 327 So.2d 911 (Ala. 1976) (statutory right of redemption); *Hartford Fed. S. & L. Ass'n v. Lenczyk*, 21 A.2d 694 (Conn. 1966) (anti-deficiency law); *Tahoe Highlander v. Westside Fed. S. & L.*, 588 P.2d 1022 (Sup. Ct. Nev. 1979) (anti-deficiency law); *Penn Fed. S. & L. Ass'n v. Joyce*, 183 A.2d 114 (N.J. App. Div. 1962) (statutory and equitable rights of redemption).

[10] *E.g., First Nat'l State Bank of N.J. v. Commonwealth Fed. S. & L.*, 455 F. Supp. 464 (D.N.J. 1978, *aff'd* 610 F.2d 164 (3d Cir. 1979); *Hawkins v. First Fed. S. & L. Ass'n*, 280 So.2d 93 (Ala. 1973); *Martyn v. First Fed. S. & L. of West Palm Beach*, 257 So.2d 576 (Ct. App. Fla. 1971) *cert. denied*, 262 So.2d 446 (192); *Townsend v. First Fed. S. & L. Ass'n*, 15 So.2d 199 (Fla. 1943); *First Fed. S. & L. Ass'n of Bowling Green v. Savage*, 435 S.W.2d 67 (Ct. App. Ky. 1968); *Parkway Inn, Inc. v. First Fed. S. & L. of Rochester*, 269 N.Y.S.2d 730 (Sup. Ct. 1966), *aff'd* 279 N.Y.S.2d 1021 (1967); *Railroad Fed. S. & L. Ass'n v. Carr*, 41 N.Y.S.2d 262 (App. Div. 1943); *Fed. S. & L. of Oklahoma v. Baxter*, 91 P.2d 760 (Okla. 1939).

[11] *E.g., Patton v. First Fed S. & L. Ass'n of Phoenix*, 578 P.2d 152 (Ariz. 1978); *Tucker v. Pulaski Fed S. & L. Ass'n*, 48S S.W.2d 725 (Ark. 1972); *First Fed. S. & L. Ass'n of Boston v. LeClair*, 253, A.2d 46 (N.H. 1969); *Continental Fed. S. & L. Ass'n v. Fe:lder*, 564 F.2d 1013 (Okla. 1977); *Bellingham First Fed. S. & L. Ass'n v. Garrison*, 553 P.2d 1090 (Wash. 1976).

(iii) THERE IS NO CONFLICT BETWEEN FEDERAL AND STATE LAW.

The Board regulation (12 C.F.R. § 545.8-3(f) and (g)) itself does not conflict with state law. It does not require any association to accelerate a loan. Rather, it merely restricts the exercise of the clause in certain limited circumstances, but otherwise makes the acceleration of loans a matter of contract between the borrower and lender. California law, on the other hand, protects borrowers by providing them with state law defenses against arbitrary and capricious accelerations by lenders. *See e.g.*, Cal. Civ. Code § 2924.6; *Wellenkamp v. Bank of America*, 21 Cal.3d 943 (1978); *Tucker v. Lassen Sav. & Loan Assn.*, 12 Cal.3d 629 (1974). Thus, the two regulatory schemes are not only not in conflict, but the state law actually enhances the operation of the federal scheme by encouraging home ownership and discouraging unjustified foreclosures. This was the purpose of Congress in enacting HOLA. *See* 12 U.S.C. § 1464(a). The decision to enforce due-on-sale clauses is that of the federal association not of the Board.[12] Federal authorization clearly does not result in immunity of private entities from state law.[13]

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[12] See *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86 (1979) (held airport proprietor liable in nuisance action for acts taken with the permission (and even "federal advice, approval and even encouragement") of the Federal Aviation Administration).

[13] *McClellan v. Chipman*, 614 U.S. 347, 356-57 (1896) (state law precluding banks from taking real property as security for preexisting debt valid as applied to a National Bank even though National Bank Act expressly authorized such a taking); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963) (Varying state and federal maturity standards for fruit resulted in state prohibition of fruit as immature, which fruit was federally certified as mature. The Court noted no "impossibility of dual compliance" because the growers could have complied with both standards by changing their harvesting methods.); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446-68 (1960) (Federally licensed vessel is subject to nondiscriminatory state laws); *Kargman v. Sullivan*, 552 F.2d 2, 6-13 (1st Cir. 1977), *reh. denied* 558 F.2d 612 (1977) and later app. 582 F.2d 11 (1978) (Federal permission to raise rents does not justify violation of rent control law where federal action was permissive, not mandatory); *Hughes v. Trans. World Airlines, Inc.*, 336 A.2d 572, 578-579 (Del.), *cert. denied*, 423 U.S. 841 (1975) and on remand 374 A.2d 5 (Del. Ch. 1977); *State ex. rel. Andrus v. Click*, 554 P.2d 969 (Idaho 1976); *Marshall v. Consumers Power Co.*, 237 N.W.2d 26, 280-281 (Mich. 1976).

Therefore, Board authorization of a due-on-sale clause does not suggest a conflict between state and federal law. Indeed, courts should not seek out conflicts where none clearly exists. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440, 446 (1960).

The regulation's provisions that the rights of borrowers are to be governed by the "terms of the contract" between the borrowers and the association, could not mean that contractual terms which are illegal under state law are nonetheless enforceable. Where, as here, the federal and state regulatory schemes can be read consistently, the United States Supreme Court has stated that "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill, Lynch, Pierce, Fenner & Smith v. Ware,* 414 U.S. 117, 127 (1973).

Of course expressions by the Board of preemptive intent (e.g. 12 C.F.R. § 556.9(f) promulgated after the decision in the instant case) does not result in a substantive rule requiring preemption. *See Chrysler Corp. v. Brown,* 441 U.S. 281, 302 (1979).

Even a Board attempt to preempt would not be valid. It is "the intent of Congress" that determines whether there is preemption. *Malone v. White Motor Corp.,* 435 U.S. 497 (1978). Professor John Hetland has referred to the Board's efforts to preempt by regulation as "a doubtful premise in view of the scope of preemption permissible under the powers delegated to it by Congress." J. Hetland, *Secured Real Property Transactions* (Cont. Ed. Bar 1977) p. 32; see Hirsh, *Towards a New View of Federal Preemption,* 1972 Univ. of Ill. L. Forum 515, 551. ("Only rarely does the [Supreme] Court respect clear expressions of agency intent to supersede or to preserve state laws.")

Moreover, by what authority does the Board purport to grant to private parties the right to abrogate state-created rights? An agency cannot delegate such responsiblities to regulatees.[14] HOLA cannot be interpreted to relieve a regulated party of liability to a third party.[15] *See also First Federal Savings and Loan Association of Englewood v. Lockwood,* 385 So. 2d 156 (Ct. App. Fla. 1980) (federal regulations do not and cannot preempt traditional state equitable considerations which require a judicial inquiry as to whether the security was impaired by the sale in breach of the due-on-sale clause). Finally, the Board cannot eliminate property rights of state citizens. *See Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

The federal associations even claim that state law is inapplicable to loans made before the Board regulations were enacted. There is no federal law or regulation which even arguably conflicts with state law as to preregulation loans.

The 1976 regulations should not be construed as being retroactively applicable to preregulation loans. To apply such a regulation retroactively would involve unconstitutional action in that it would take certain accrued rights away from borrowers. *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398 (1934).

(iv) THE PREEMPTION DOCTRINE IS INAPPLICABLE IN THIS CASE.

State law may be prempted by Federal legislation only where Congress either intended preemption, or where there is a conflict between federal law and state law (*Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 157-158 (1978)) such as "where compliance with both federal and state regulations is a physical

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[14] *See National Association of Independent Television Producers and Distributors v. F.C.C.,* 516 F.2d 526 (2d Cir. 1975).

[15] *See Regents of the University System of Georgia v. Carroll,* 338 U.S. 586, 602 (1950) ("We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."); *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290 (976) (action can be maintained despite fact that act was authorized by the C.A.B.).

impossibility". *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142-143 (1963). This court should be mindful of its repeated warnings that preemption is "not lightly to be presumed." *Schwartz v. Texas,* 344 U.S. 199, 202-203 (1952), cited with approval in *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 414 (1973). *Accord, Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132 (1978). ("This Court is generally reluctant to infer preemption.")

There are sound policy reasons for such narrow application. If no preemption is found, Congress can always change the results by legislation; erroneous preemption, however, leaves the states impotent to correct the situation. *See City of Burbank v. Lockheed Air Terminal* 411 U.S. 624, 643 (1973) (dissenting opinion). Indeed, this court should note that the very issue of preemption in the context of due-on-sale clauses is now pending in Congress, S. 1703 § 301.

As noted above, there is no conflict between state and federal law. There is no express preemption. And the legislative history of HOLA suggests that preemption cannot be inferred.

In the instant case no uniformity is needed since the federal associations generally operate only in their home states and federal and state laws do not even purport to regulate the same subject. Federal law regulates the operation of federally-chartered savings and loan associations while state law regulates real property transactions.

No case holds that federal law occupies the fields of contract law and real estate law simply because one party to a transaction happens to be a federally chartered savings and loan association. Indeed, the cases are to the contrary.[16] An occupation of the field theory of preemption would mean that all notes and mortgages to which a federal savings and loan is a party would have to be governed by federal common law.[17]

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[16] See *Derenco Inc. v. Benjamin Franklin Fed. S. & L. Ass'n,* 281 Or. 533, 577 P.2d 477 (1978), *cert. denied* 439 U.S. 1051 (1978); *De Simone v. Warwick Fed. S. & L. Ass'n,* 482 F. Supp. 1190 (D.R.I. 1980).

[17] See *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, 456-457 (1967); Osborne, Nelson and Whitman, *Real Estate Finance Law* 694-695 (1979).

Showing the impact of state law on these private institutions which are "regulated" by a federal agency does not show interference with federal regulation. A federally chartered savings and loan association is "an essentially private business organization. . . It is wholly private in character; it is not part of the Federal government and performs no substantial Federal function."[18] Moreover, even if the federal savings and loans were "federal instrumentalities" they would be "subject to the laws of the state . . . all their contracts are governed and construed by state laws", and state law is only inapplicable when it "incapacitates [them] from discharging their duties to the government . . ."[19]

The existence of comprehensive federal regulation, which may be different than state regulation, does not in itself result in preemption.[20]

There is no authority to suggest that Congress gave the Board power to override historic state laws concerning real property transactions with local residents. Indeed, "before preemption shall be deemed to have occurred there must be either a clear manifestation of such congressional intent or a conflicting inconsistency between state and federal regulations . . . . This is particularly true where the field of regulation is one that has been traditionally occupied by the states."[21] *See*

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[18] *Midwest Federal S. & L. Ass'n v. Commissioner of Revene*, 259 N.W.2d 596, 598 (Minn. 1977). The associations are not federal instrumentalities with regard to their loan functions. *Gibson v. First Federal Savings & Loan Ass'n*, 347 F. Supp. 560, 563 (E.D. Mich. 1972). Indeed, state associations and other financial institutions regulated at least in part by the federal government may be similarly affected by state law.

[19] *McClellan v. Chipman*, 164 U.S. 347, 356-57, 359 (1896). *See also Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 247-48 (1944); *First National Bank of Louisville v. Commonwealth of Kentucky*, 76 U.S. (9 Wall) 353, 362 (1870).

[20] *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415 (1973); *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963).

[21] *Katharine Gibbs Sch. (Inc.) v. F.T.C.*, 612 F.2d 658, 667 (2d Cir. 1979) (held regulation beyond Commission's power); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) ("[T]he board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do.")

United States v. Little Lake Misere Land Co., 412 U.S. 580, 591-522 (1973); *Butner v. United States*, 440 U.S. 48 (1979); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1942) (state law is the "source of law . . . for mortgages, and for many other legal principles affecting property interests"); *Sunderland v. United States*, 266 U.S. 226, 232 (1924); *United States v. Fox*, 94 U.S. 315, 320 (1877) (transfer of property a state matter).

(v) EVEN IF THE BOARD REGULATION CAN BE CONSTRUED LEGALLY TO PREEMPT STATE LAW, BY AGREEING TO USE STATE LAW THE FEDERAL ASSOCIATIONS HAVE WAIVED ANY PREEMPTION RIGHTS.

As noted above, the federal association uses notes and deeds of trust which specifically provide for the application of state law. It uses California corporations as trustees which actually enforce the due-on-sale clauses.

By obtaining an interest in California real estate, the federal association has agreed to be bound by state law. Cal. Civ. Code § 755. Indeed, its own deed of trust demonstrates that it not only utilizes state law to enforce its mortgage interests, but also, in effect, has agreed to be bound by state law.

In *United States v. Stewart*, 523 F.2d 1070 (9th Cir. 1975), the court held that the government was bound by state law relating to deficiency judgments in connection with a Veteran's Administration loan when the note and the deed of trust provided for the application of state law. Similarly, in *United States v. MacKenzie*, 510 F.2d 39 (9th Cir. 1975), the court in an *en banc* decision held that state anti-deficiency law applied to SBA loans. The court noted that as in *United States v. Yazell*, 382 U.S. 341 (1966), "by thwarting debtor protections imposed by state law, the Government obtained an unconscionable advantage over debtors by gaining rights that no other creditor could have had." 510 F.2d at 41. Here, the federal associations seek rights against their borrowers which state associations do not have. The fact that its own loan

instruments call for the application of California law makes its position even more unconscionable. Under the law, it is thus clear that the federal association consented to be bound by California law.

In their dealings with California property, the federal savings and loan associations are subject to California law, which provides that "Real Property within this State is governed by the law of this State, except where the title is in the United States." Cal. Civ. Code § 755. *See United States v. Certain Parcels of Land,* 131 F. Supp. 65, 70 (S.D. Cal. 1955). By claiming immunity from California law against unreasonable restaints on alienation, while at the same time taking advantage of other California laws, the federal institutions are in effect asserting the right to pick and choose those parts of the California law which they will allow to be applied.

The federal associations must not be permitted to avail themselves of the benefits of the California law of mortgages, while simultaneously refusing to be bound by those portions of that same law which they find distasteful.

As the Supreme Court stated in upholding the applicability of a state statute to banks, "It is a strange argument that permits one to pick and choose what portion of the law binds him." *First Nat. Bank. v. Walker Bank,* 385 U.S. 252, 261 (1966); *see also First Citizens Bank and Trust Company v. Camp,* 409 F.2d 1086, 1091 (4th Cir. 1969), *aff'g* 181 F. Supp. 786 (E.D.N.C. 1968).

Thus, even if there were some preemption (which there is not), the federal associations have, by their activities, waived the right to assert it.

(vi) THERE ARE REASONS WHY THIS COURT SHOULD NOT NOTE PROBABLE JURISDICTION.

California appellate courts have held that there is no preemption as to the application of state law to the substantive

rights of borrowers from federally chartered associations.[22] *Panko v. Pan American Fed. Sav. & Loan Assn.*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981); *de la Cuesta v. Fidelity Federal Savings and Loan Assn.*, 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (1981). In these cases, the California Supreme Court has not granted a hearing, thus making the law of the instant case the law of California. *See also* Note, *Due-on-Sale Clause and Restraints on Alienation: Does Wellenkamp Apply To Federal Institutions?* 11 Pac L. Jour. 1085 (1980).[23]

That certain federal courts have held that there was preemption is irrelevant since federal courts generally have no jurisdiction to hear cases between the association and the borrower. *See Guinasso v. Pacific First Federal Savings and Loan Ass'n.*, 656 F.2d 1364 (9th Cir. 1981); *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 660 (9th Cir. 1972); *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank*, 627 F.2d 343, 350-353 (8th Cir. 1980); *People v. Glendale*, 475 F. Supp. 728 (C.D.Cal 1979).

There is presently pending in Congress legislation dealing with this subject matter which may render this and other cases in large part moot. S. 1703, 97th Cong. 1st Sess. Oct. 5, 1981. In addition, the federal associations have been provided with various new devices which offset any difficulties encountered with enforcing the due on sale clause. *See e.g.* 12 C.F.R § 545.6-4(c) (allows variable interest rate loans); 46 Fed. Reg. 24148 (adjustable interest rate provisions); 46 Fed. Reg. 32013 (decreases liquidity requirement); Econ. Recovery Act of 1981, Section 301, 97 Stat __ (allows tax free accounts).

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[22] *Compare Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256 (9th Cir. 1979), *aff'd mem.* 445 U.S. 921 (1980) (held that certain procedural aspects of California's anti-redlining law were preempted, but left open the question as to whether the substantive rights of citizens under state law were preempted; we deal here with the substantive rights of borrowers under state laws).

[23] The Solicitor General, in his brief in *de la Cuesta*, improperly refers to an opinion decertified for publication by the California Supreme Court. The citation to unpublished opinions is prohibited. California Rules of Court, Rule 977. If anything, the decertification shows the California Supreme Court's position in favor of the views of the Secretary.

Moreover, in order to find preemption, there must be some factual showing of conflict in the operation of federal and state law. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *De Canas v. Bica*, 224 U.S. 351 (1976); *Askew v. American Waterways, Inc.*, 411 U.S. 325 (1973). The instant case arises by way of a summary judgment. Accordingly, these cases are inappropriate vehicles for resolution of the issues involved.

B. CONCLUSION

For all of the foregoing reasons, *Amicus* urges the court to either affirm the judgment without a hearing or to dismiss the appeal.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

ARTHUR C. DE GOEDE,
Assistant Attorney General

JOSEPH M. O'HERON,
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2339

RICHARD M. MOSK
W. GARY KURTZ

Attorneys for Amicus Curiae
The Secretary of the Business
Transportation and Housing
Agency of the State of
California